No. 2902

United States
Circuit Court of Appeals
For the Ninth Circuit

AMERICAN WATER WORKS AND ELECTRIC COMPANY, a corporation, and WILLIAM T. WALLACE, Receiver of Great Shoshone & Twin Falls Water Power Company, a corporation,
Appellants,

vs.

GUY I. TOWLE, plaintiff, GREAT SHOSHONE & TWIN FALLS WATER POWER COMPANY, a corporation, defendant, and BOISE TITLE AND TRUST COMPANY, a corporation, LYNCH-CANNON ENGINEERING COMPANY, a corporation, EQUITABLE TRUST COMPANY OF NEW YORK, a corporation, INTER-MOUNTAIN ELECTRIC COMPANY, a corporation, THE THOUSAND SPRINGS POWER COMPANY, a corporation, ELECTRIC INVESTMENT COMPANY, a corporation, L. M. PLUMMER and E. B. SCULL, Executors of the Estate of L. L. McClelland, deceased, intervenors and petitioners,
Appellees.

Transcript of the Record

Upon Appeal from the United States District Court for the District of Idaho, Southern Division

KYNS-YORK CO., PRINTERS & BINDERS, BOISE 42924

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Upon Appeal from the United States District Court for the District of Idaho, Southern Division

INDEX

Names and Addresses of Solicitors of Record:

WYMAN & WYMAN, Boise Idaho,
For Appellants American Water Works and Electric Company and William T. Wallace as Receiver of Great Shoshone and Twin Falls Water Power Company.

S. H. HAYS, Boise, Idaho,
For Appellee Boise Title and Trust Company.

KARL PAINE, Boise, Idaho,
For Appellee Guy I. Towle.

S. H. HAYS and P. B. CARTER, Boise, Idaho,
For Appellee Great Shoshone and Twin Falls Water Power Company.

MARTIN & CAMERON, Boise, Idaho,
For Appellees L. M. Plummer and E. B. Scull, Executors of the Estate of L. L. McClelland, deceased.

EDWIN SNOW, Boise, Idaho,
For Appellee Lynch-Cannon Engineering Company.

RICHARDS & HAGA, Boise, Idaho,
For Appellees Equitable Trust Company of New York, and Electric Investment Company.

PARSONS & PARSONS, Salt Lake City, Utah,
For Appellees Intermountain Electric Company, and The Thousand Springs Power Company.

In the District Court of the United States, for the District of Idaho, Southern Division.

GUY I. TOWLE, Complainant,

vs.

GREAT SHOSHONE AND TWIN FALLS WATER POWER COMPANY, a corporation, Defendant.

In Equity—No. 509.

BILL OF COMPLAINT.

"The Complainant, Guy I. Towle, a citizen and resident of the State of Idaho, brings this bill on his own behalf and on behalf of all creditors of the Great Shoshone and Twin Falls Water Power Company, who may hereafter join in the prosecution of this suit against the Great Shoshone and Twin Falls Water Power Company, a corporation, organized and existing under the laws of the State of Delaware, and a citizen of said State, and thereupon the Complainant complains and alleges as follows:

I.

That the Complainant is a resident and citizen of the State of Idaho, and of the District of Idaho, Southern Division, and resides in Lincoln County in said State.

II.

That the defendant is now, and at all the times hereinafter mentioned, was a corporation organized and existing under the laws of the State of Delaware, of which State it is a citizen, and having its statutory office at Wilmington, in said State, but has all of its property and carries on all of its business in the

State of Idaho, where it is duly licensed to carry on such business, having its principal office and place of business in Twin Falls County, Idaho, and that all of its property and principal office in said State of Idaho are situated in the Southern Division of the District of Idaho.

III.

That the defendant, Great Shoshone and Twin Falls Water Power Company, was organized under the laws of the State of Delaware on or about the 26th day of January, 1907, for the purposes, among others, of acquiring water powers, water rights and appropriations and other property and of acquiring and operating power stations and heating and lighting stations and their accessories and of dealing in water power, electrical power and electrical energy and apparatus, machinery and other property used or useful in connection therewith.

IV.

The Complainant is informed and believes and therefore alleges that the defendant has an authorized capital stock of One Million ($1,500,000.00) Five Hundred Thousand Dollars, divided into fifteen (15,000) thousand shares of the par value of one hundred ($100.00) Dollars each, all of which has been issued and is now outstanding.

V.

The Complainant is informed and believes and therefore alleges that on or about the 7th day of May, 1907, the defendant filed in the office of the Secretary of State of Idaho a duly authenticated copy of the

Certificate of Incorporation and an acceptance of the Constitution and Laws of the State of Idaho, and a designation of an agent in said State; that thereafter, the defendant proceeded to acquire lands and water powers in said State of Idaho, and to conduct its business in said State; that the defendant is now the owner of various parcels of real estate located at and near Shoshone Falls, in the County of Lincoln, and others at and near Lower Salmon Falls in the Counties of Gooding and Twin Falls, upon which are located power plants. It also owns water appropriations upon the Snake River at or near these points, and as well, an extensive distributing system whereby it supplies electric light, heat and power for domestic, commercial, irrigation and municipal purposes throughout that part of Southern Idaho east of and including Mountain Home and Grand View to Milner and Oakley.

VI.

That heretofore and on or about the 26th day of May, 1913, for moneys advanced to it, defendant made, executed and delivered to American Water Works and Guarantee Company, a corporation organized under the laws of the State of New Jersey, its demand promissory note dated on the said day, for the sum of Twelve Thousand ($12,857.29) Eight Hundred Fifty-seven Dollars and Twenty-nine Cents, of which note Complainant thereafter became and now is the owner and holder, and that no owner or holder of said note ever was or is a citizen or resident of the State of Delaware; that payment of said

note has been duly demanded and there is now due and owing thereon to Complainant the sum of Twelve Thousand ($12,857.29) Eight Hundred Fifty-seven Dollars and Twenty-nine Cents, with interest at the rate of Six (6%) Per Cent. per annum from May 26th, 1913.

VII.

That the Complainant is advised and believes and therefore alleges that the property of the defendant consists of certain bills and accounts receivable, amounting in the aggregate to not exceeding One Hundred ($140,000.00) and Forty Thousand Dollars, whereof, however, a large part is of doubtful collectibility; cash on hand or in bank not exceeding Five Thousand ($5,000.00) Dollars; and real estate, lands, power stations, water appropriations, distributing system and equipment of large actual and potential value; that Complainant is informed and believes and therefore alleges that the value of the property of defendant, if properly conserved and continuously operated, is greatly in excess of the amount of its liabilities; that said properties are at the present time profitably operated and produce a considerable income in excess of the cost of operation, and that the continued operation of its property is essential to the preservation of its value and in the public interest, and will result in an enhancement of the value of its assets.

VIII.

The Complainant is further informer and believes and therefore alleges that the defendant has made

heavy expenditures for the increase of its plant and equipment and has become heavily indebted therefor; that it is also indebted for supplies furnished in connection with its operation; that on account of the present conditions existing throughout the financial centers of the United States, due to the war now raging in Europe and other causes, the defendant has been and is now unable to obtain further credit or borrow further funds; that payment of moneys owing to the defendant has been delayed by the persons owing the same, and that more than Ninety Thousand ($90,000.00) Dollars, due from companies to whom power has been furnished for pumping water for irrigation, are not collectible at the present time; that under these circumstances and because thereof, and for other reasons, a situation has resulted where the defendant, notwithstanding the great value of its properties, is and will be unable to meet its obligations and the interest thereon as they mature and become payable.

IX.

The exact amount of the indebtedness of the defendant is unknown to Complainant, but the Complainant is informed and believes and therefore alleges that the amount of said indebtednecc is substantially as follows:

$2,340,000.00 of First Mortgage Five Per Cent. Gold Bonds issued under and secured by a mortgage dated May 1, 1910, to the Trust Company of America, and James D. O'Neil as Trustee, which said bonds are dated May 1, 1910, and are payable May 1, 1950.

Of said First Mortgage Bonds, $115,000.00 are outstanding in the hands of third parties, and the remainder, viz., $2,225,000.00 in principal amount, are pledged as collateral to issues of the Company's Six Per Cent. Coupon Notes which have been issued and are outstanding to the amount of $1,780,000.00. Said notes are of two issues, each secured by the deposit of First Mortgage Bonds of the Company under a collateral trust indenture to the Commonwealth Trust Company of Pittsburgh, as Trustee. Of said outstanding Six Per Cent. Coupon Notes, $155,000.00 in principal amount became due and payable August 1, 1914, and are overdue and unpaid, and $16,000.00 in principal amount became due November 1, 1914, and are overdue and unpaid, and an installment of interest upon certain of said notes, aggregating in principal amount $48,750.00, fell due November 1, 1914, and still remains unpaid; and the defendant has refused payment of said notes and interest and is in default in the payment thereof.

Complainant is informed and believes and therefore alleges that the defendant is further indebted upon notes and accounts payable to an amount in excess of $1,300,000.00, including the note held by Complainant, the greater portion of which is past due.

X.

The complainant is further informed and believes, and therefore alleges that many creditors of the defendant are pressing defendant for payment of their claims, and there is great danger that the said credi-

tors will bring suits upon the same to attach the property of the defendant and levy execution and in various ways enforce their respective claims; that unless this Court, in view of the financial embarrassment of the defendant as aforesaid, will deal with the property as a single trust fund and take it into judicial custody for the protection of every interest therein, there is great danger that the properties of the defendant may no longer be operated as a continuous system and enterprise; that action on the part of the creditors will result in judgments, executions and seizures by sheriffs or other like officers, and forced sales of the property of the defendant and interruption of the business of the defendant; that individual creditors will assert their remedies in different courts; that conflicts between creditors and between courts will be promoted; that a vast and unnecessary multiplicity of suits will result and that a great and irreparable injury and loss will be caused to the defendant and to its creditors; that should any of the creditors of the defendant succeed in the enforcement of their claims and thereby compel the defendant to suspend its business and become inactive, irreparable injury, damage and loss will be caused, not only to all the creditors of the defendant but to the public and to the communities and municipalities and the residents thereof to which defendant is now engaged in the supply of electric current for lighting, heating and power purposes; that the defendant and its properties may be placed in a position where it will be impossible to continue its de-

velopment and comply with the orders of the Public Utilities Commission of the State of Idaho; that waste and loss can be avoided and property preserved for the service of the public and for the equitable benefit of all those interested therein, only by the intervention of a court of equity and the granting of equitable relief, including the appointment of a Receiver.

XI.

That under these circumstances, the intervention of a court of equity is imperatively required for the protection of the rights of the complainant and of all other parties in interest, especially for the timely appointment of a receiver to take charge of and preserve the property of the defendant, continue the operation of its undertaking, and collect and receive and properly appropriate the income thereof until the final decree of the Court in the premises.

XII.

That this is a civil suit in the nature of a claim in equity and the matter in dispute exceeds, exclusive of interest and costs, the sum of Five Thousand ($5,000) Dollars.

XIII.

Inasmuch as the Complainant has no adequate remedy at law for his aforesaid greivance and can have relief only in equity, the complainant files this bill of complaint on behalf of himself and all other creditors of the defendant who may come in and contribute to the expenses of the suit and prays for equitable relief as follows:

(1) That the rights of the Complainant and of all other creditors of the defendant may be ascertained and decreed, and that the Court fully administer the property and funds in which the complainant is interested, and for such purpose marshal all the assets of the defendant and ascertain the several and respective liens and priorities existing thereon, and enforce and decree the rights, liens and equities of the creditors of the defendant as the same may be finally ascertained by the Court.

(2) That the Court forthwith appoint a receiver of all and singular the property and assets operated, held, owned or controlled by the defendant, including its land, and all equipment, materials, machinery, supplies, book accounts, choses in action, and assets of every description, wheresoever situated, belonging to the defendant, with full power and authority to take the same into his possession, and to hold, manage and operate the same, and to conduct the business now being conducted by the defendant; to collect and receive all the earnings, rents, issues, profits and income thereof, and to apply the said receipts under order of decree of the Court for such period as the Court shall order; with all the incidental powers ordinarily vested in receivers in like cases and with such additional powers as the Court may from time to time grant, and to incur such expenses as may be necessary or advisable for labor, supplies and materials, or otherwise, in connection with the administration of the assets and property of the defendant.

(3) That all creditors and stockholders and other persons be enjoined from instituting or prosecuting or continuing the prosecution of any actions, suits or proceedings at law or in equity or under any statute against the defendant in any Court, wheresoever situated, and from levying any attachments, executions or other processes upon or against any of the properties of the defendant, or from taking or attempting to take into their possession the property or any part of the property of the defendant, and that the defendant, and its officers, directors, agents and employees, and all other persons, be enjoined and restrained from interfering with or hindering the taking into possession of the defendant's property by the said receiver and from transferring, selling, or disposing of any of the property or income of the defendant, or attempting to sell or dispose of the same in any manner.

(4) That at such times as may be found just and proper the properties of the defendant may be ordered to be sold as an entirety or in such parcels and at such places and in such manner and upon such terms and conditions as the Court shall deem just and equitable, and the proceeds of any such sale be distributed among those entitled thereto, or that the properties of the defendant, after satisfaction of the claims of creditors, may be returned to it, or that such other action may be taken in respect thereto as to the Court may seem proper, and as may be necessary to fully protect and enforce the rights and equities of the Complainant and of all other creditors of the defendant and other parties in interest.

(5) That this Court will grant unto the Complainant a writ of subpoena directed to the defendant, requiring the defendant to appear before this Court on a certain day therein named, and then and there to answer all and singular the matters therein set forth (but not under oath, an answer under oath being hereby expressly waived) and further to perform and abide by such further order, direction or decree as shall be made herein, and as to the Court shall seem meet.

(5) That the Complainant have such other and further relief as to the Court may seem just and equitable.

And the Complainant will ever pray, etc.

(Signed) N. M. RUICK,
Solicitor for Complainant.

Filed Nov. 2, 1914.

A. L. Richardson, Clerk.

(Title of Court and Cause.)
Equity No. 509.

ORDER APPOINTING RECEIVER.

This cause came on to be heard and, after hearing counsel and the defendant consenting thereto, and it appearing that it is necessary for the protection and preservation of the respective rights and equities of the complainant and all other creditors of the defendant that the property and business of the defendant be preserved, operated and administered in this suit through a receiver to be appointed by this Court,

and that it is necessary that a receiver of the defendant and its property should be appointed forthwith and with powers herein granted; it is, after consideration, hereby

Ordered, adjudged and decreed that William T. Wallace, of Twin Falls, in the State of Idaho, be and he hereby is appointed receiver of the Court of the defendant Great Shoshone and Twin Falls Water Power Company and of all and singular the property, lands, plants, system, franchises, rights, claims, interests and assets of the said defendant of every name and nature and wheresoever situated, and he is hereby authorized forthwith to take possession thereof and to preserve, manage, operate and use the same and to conduct and carry on the operation of the hydro-electric power system and other business and properties of the defendant in such manner and to such extent as in his judgment is necessary and desirable and to exercise all authority, franchises and privileges of the defendant. The said receiver is authorized and directed to collect all moneys and other properties due and to become due to said Great Shoshone and Twin Falls Water Power Company; to institute and prosecute such suits in his own name as receiver or in the name of the Company or otherwise as he may be advised or as may be now pending in behalf of the Company, and to defend such suits as may be brought against him and those now pending or hereafter brought against the defendant which affect or may affect the property, rights and franchises of which he is or may become receiver.

Said receiver is also authorized and is hereby given full power and authority in his discretion to appoint and employ such agents, attorneys, officers, managers and employees as shall be necessary to aid him in the proper discharge of his duties; and it is

Further ordered, adjudged and decreed that the defendant and all persons, firms and corporations in possession of any of the property of the defendant forthwith deliver the same to the receiver; and the said defendant and the officers, directors, agents, attorneys and employees thereof and all other persons, firms and corporations whatsoever are hereby restrained and enjoined from interfering with, attaching, levying upon, seizing or in any manner whatsoever distributing any portion of the properties, rights and franchises of the defendant, or taking possession thereof or in any manner interfering with the same or any part thereof without the consent of the receiver, and from interfering in any manner with or preventing the discharge by said receiver of his duties or his operation and management of said properties and premises under the order of this Court; and it is

Further ordered, adjudged and decreed that the said receiver shall retain possession and continue to discharge the duties and trusts aforesaid until further order of this Court in the premises and that he shall from time to time apply to this Court for such other and further order and direction as he may deem necessary and requisite to the due administration of said trust; and it is

Further ordered, adjudged and decreed that within five days from the date of this order the said receiver shall execute and file with the Clerk of this Court a bond with one or more sureties, approved by this Court in the penal sum of Twenty-five Thousand Dollars ($25,000), conditioned upon the faithful discharge of his duties, and to account for all funds coming into his hands and to abide by and perform all things which he shall be directed by the Court to do.

Dated November 2, 1914.

FRANK S. DIETRICH,
District Judge.

Filed Nov. 2, 1914.

A. L. Richardson, Clerk.

(Title of Court and Cause.)
Equity No. 509.

CLAIM OF AMERICAN WATER WORKS AND ELECTRIC COMPANY.

State of New York,
County of New York,
City of New York,—ss.

On this 30th day of July, 1915, before me, the undersigned, personally appeared Sturt H. Patterson, personally known to me, who being by me duly sworn, deposes and says:

That he is the Vice-President and Treasurer of The American Water Works & Electric Company, Incorporated, hereinafter called the claimant, and its duly authorized agent in the making of this affi-

davit, and that The Great Shoshone & Twin Falls Water Power Company, the defendant in the above entitled cause, is justly indebted unto the claimant on account of the matters and things hereinafter mentioned and in the amounts hereinafter set forth, with interest thereon, to-wit:

First. On open book account of the defendant company unto the American Water Works & Guarantee Company in the sum of Five Hundred Fifty-one Thousand Seven Hundred Seventy-six Dollars Sixty-two Cents ($551,776.62) with interest thereon from July 7th, 1913, duly assigned and transferred for a valuable consideration unto the claimant herein.

Said book account is exceedingly voluminous as its various items are on account of numerous charges made against the defendant company by said Guarantee Company on account of the construction and equipment of the power projects and transmission lines and systems of the defendant company by said Guarantee Company extending over a period of about six (6) years, and of charges made for advances by said Guarantee Company, to said defendant company for the purposes aforesaid and in the financing of the defendant company, all of which the defendant company promised to pay unto said Guarantee Company but which it has failed to do; that a complete transcript thereof would fill many dozens of pages of closely typewritten matter and your affiant is informed that the furnishing of such transcript would on that account be unnecessary and unnecessary for the further reason that the books of the defendant

company show it to be indebted unto said Guarantee Company on account of the matters in this paragraph mentioned in the amount hereinbefore given.

Second. That the defendant company is further indebted unto the claimant herein on account of expenditures made by the receivers of the American Water Works and Guarantee Company under orders of the court of their appointment authorizing the making of the same and which were made at the special instance and request of the defendant company, and which the defendant company promised to repay but has failed so to do, with interest on said expenditures and advances at six per cent (6%) per annum from the dates next hereinafter mentioned, at which time such expenditures and advances were made and an itemization of which is as follows:

July 22, 1913	$ 19.02
Sept. 19, 1913	2,500.00
Oct. 24, 1913	2,500.00

That the said claims have been duly assigned to the claimants herein for a valuable consideration and are justly owing unto it by the said defendant company.

Third. That defendant company is further indebted unto the claimant herein on account of a certain promissory note of the defendant company, dated June 15, 1913, in the sum of Thirty-eight Thousand Two Hundred Forty-one ($38,241.00) Dollars bearing interest at six per cent (6%) per annum, less a credit entered on this note July 2, 1914, in the sum of Twenty Thousand ($20,000) Dollars. The said

note was payable to the order of said Guarantee Company, duly endorsed for transfer, and was acquired by claimant for valuable consideration and is now held by claimant.

Fourth. That the defendant company is further indebted unto the claimant herein in the sum of Sixty-seven Thousand Five Hundred Ninety Dollars and Fifty-eight Cents ($67,590.58) with interest thereon from the 7th day of July, 1913, on account of the following matters and things:

That in July, 1913, the American Water Works & Guarantee Company in the suit of Frank G. Glover et al. vs. said company in the District Court of the United States for the Western District of Pennsylvania, was placed in the hands of receivers under an order of said court and at that time that company had on deposit with various banks the sum of Sixty-seven Thousand Five Hundred Ninety Dollars and Fifty-eight Cents ($67,590.58) and said banks held the unsecured promissory notes of the defendant company (all maturing within six (6) months from July 7, 1913) payable to the order of said American Water Works & Guarantee Company to the aggregate amount of Three Hundred Thirty-three Thousand Six Hundred Forty-three Dollars Seventy-one Cents ($333,643.71) in their principal sums, the same having for a valuable consideration been delivered to said Guarantee Company and by it endorsed and discounted with said banks.

That the aforesaid sum of money belonging to said Guarantee Company was on July 7, 1913, impounded

by the banks holding said funds on deposit and was by said banks applied to payment *pro tanto* of the sums owing to said banks holding such notes.

That the amount for which claim is hereinbefore made were acquired by claimant at a public sale of all of the property and assets of said American Water Works & Guarantee Company as an entirety in the above entitled cause against said company in the United States District Court for the Western District of Pennsylvania under a decree of sale made on April 16, 1914, which decree of sale was made absolute by an order entered in said suit on the 28th day of April, 1914, and pursuant to which a deed was executed and delivered under date of May 1, 1914, unto claimant for all of the property and assets of said Guarantee Company.

That in and by said deed there was thus transferred to the claimant herein all of the claims of the said Guarantee Company hereinbefore referred to and of its receivers against the defendant herein, and on account of the purchase by the claimant of said property and assets of said Guarantee Company and the deed conveying the same, the claimant herein is entitled not only to reimbursement for the amount referred to in this paragraph but to payment by the defendant of the other items hereinbefore claimed with interest thereon as stated.

Fifth. That the defendant Company is further indebted unto the claimant herein in the sum of One Hundred Five Thousand Seven Hundred Three Dollars and Ninety Cents ($105,703.90) with interest

thereon at six per cent (6%) per annum from April 30, 1914, advanced to the defendant company at its special instance and request by the Stockholders Protective Committee of said Guarantee Company and which the defendant company promised to repay but has failed so to do.

That the above mentioned claim of said Stockholders Protective Committee was duly assigned unto the claimant herein and the amounts now represented by this claim are justly due and owing unto the claimant herein.

Sixth. That the said defendant company is further indebted unto the claimant herein in the sum of Eleven Thousand Eight Hundred Eighty-eight Dollars and Thirty-seven Cents ($11,888.37), less rebates allowed amounting to Six Hundred Eighty-one Dollars and Fifty-eight Cents ($681.58) and protest fees amounting to Eleven Dollars and Forty-six Cents ($11.46), a total of Eleven Thousand Two Hundred Eighteen Dollars and Twenty-five Cents ($11,218.25) being in payment of interest as adjusted as of April 30, 1914, with the banks then holding the promissory notes of the defendant company hereinbefore mentioned and which payment was advanced by claimant unto defendant company at the special instance and request of the defendant company and which the defendant company promised to repay but has failed so to do, and which amount of Eleven Thousand Two Hundred Eighteen Dollars and Twenty-five Cents ($11,218.25) with interest thereon from the eleventh day of August, 1914, at

six per cent (6%) per annum, is still due and owing unto the claimant.

Seventh. That the defendant is further indebted unto the claimant herein in the sum of Three Hundred Twenty-two Thousand Three Hundred Dollars ($322,300) on account of the following matters and things:

That three of the promissory notes of the defendant company referred to in paragraph Fourth hereof were in July, 1913, substituted with three new notes of the defendant company for like amounts with accrued interest to the date of substitution and these new notes so issued in substitution were issued and dated on the following dates and for the following amounts:

July 25, 1913	$30,251.78
July 28, 1913	34,693.91
July 29, 1913	36,725.69

All of these notes so issued in substitution were made payable to the order of said Guarantee Company and were by it endorsed for transfer pursuant to an order of said United States District Court for the Western District of Pennsylvania in the above entitled cause against said company and were delivered to the bank holding the notes for which the new notes were issued in substitution.

That between the 15th day of May, 1914, and the 31st day of August, 1914, said new notes so issued in substitution and the then remaining notes referred to in paragraph Fourth thereof, were substituted with new notes of the defendant company to the ag-

gregate amount of Two Hundred Sixty-seven Thousand Five Hundred One Dollars and Ninty-three Cents ($267,501.93) and at the request of the defendant company and deposited as collateral security for the payment of the principal and interest of the said new notes so issued in substitution, the sum of Three Hundred Twenty-two Thousand Three Hundred Dollars ($322,300) at par of its collateral trust 20-year five per cent Gold Bonds of the claimant, dated April 1, 1914, and issued under and secured by its Deed of Trust unto the Bankers Trust Company of the City of New York, which bonds under the terms of such new notes so issued in substitution may be sold by the holders of said notes upon non-payment of the principal thereof, any of which notes may be made due and payable by the respective holders thereof upon non-payment at any semi-annual date, August 1st or February 1st of each year, in event of default in payment of interest then maturing. The aforesaid notes so given by the defendant in substitution are all dated as of the first of February, 1914, and are by their terms due and payable on or before two years from that date.

That owing to the insolvency of the defendant company and the pending foreclosure of its mortgage, dated May 1, 1910, unto the North American Trust Company and James D. O'Neil, Trustees, the present trustees thereunder being The Equitable Trust Company of New York and F. R. Babcock, securing bonds outstanding thereunder to the aggregate amount of Two Million Three Hundred Forty Thousand Dollars

($2,340,000) in their principal sums, the par value of the above bonds will be lost to the claimant herein as the defendant company will be utterly unable to make payment either of principal or interest upon said notes and which said bonds will be sold to enforce the security of said notes, and on that account the defendant company is justly indebted unto the claimant for the par value of said bonds of the claimant amounting to Three Hundred Twenty-two Thousand Three Hundred Dollars ($322,300), together with interest accruing thereon from April 1, 1915, to which date interest on said bonds has been paid.

Eighth. That defendant company is further indebted unto the claimant herein in the following amounts with interest thereon from the following dates:

October 5, 1914	$4,093.71
January 31, 1915	8,025.03
July 30, 1915	8,025.03

These amounts are due on account of interest payments made by the claimant upon the above mentioned notes of the defendant company referred to in paragraph Seventh hereof, and which the claimant has found it necessary to pay on account of its having deposited its bonds as collateral security for the payment of said notes. Interest is due unto claimant upon the above mentioned amounts from the date of said respective payments at the rate of six per cent (6%) per annum.

Ninth. The defendant company is further indebted unto the claimant herein in the amounts next here-

inafter set forth with interest thereon from the respective dates of the assignments hereinafter mentioned, at six per cent (6%) per annum, on account of the assignment to the claimant herein of open book accounts of the following named companies against said defendant company:

Southern Idaho Telephone Company, Limited,
Amount of account assigned.....$ 117.38
Assignment dated October 22, 1914.

Twin Falls North Side Land & Water Company,
Amount of account assigned..... 114,024.19
Assignment dated July 3, 1914.

Twin Falls Salmon River Land & Water Company,
Amount of account assigned..... 5,529.95
Assignment dated June 4, 1914.

Twin Falls North Side Investment Co., Limited,
Amount of account assigned..... 29,029.27
Assignment dated October 2, 1914.

North Side Canal Company, Limited,
Amount of account assigned..... 32.59
Assignment dated September 2, 1914.

The aforesaid accounts were acquired by claimant for a valuable consideration and are justly due and owing unto it.

Tenth. The defendant company is further indebted unto the claimant herein in the sum of Eleven Thousand Seven Hundred Twenty-five Dollars and Fifty-two Cents ($11,725.52) with interest thereon at six per cent (6%) per annum from June 8th, 1914, on account of the following matters and things:

On the date last mentioned the defendant company

executed and delivered its four certain promissory notes dated June 8, 1914, each for the sum of Two Thousand Nine Hundred Thirty-one Dollars and Thirty-eight Cents ($2,931.38) each to the order of Slick Brothers Construction Company, Limited, all of which have been acquired by the claimant herein for a valuable consideration and are now held by it, each of which notes is of like tenor and date and is duly endorsed for transfer.

Eleventh. That defendant company is further indebted unto the claimant herein on items of open book account in the sum of Twenty-five Thousand Five Hundred Thirteen Dollars and Four Cents ($25,513.04) appearing on statement of account hereto attached and marked "Exhibit A" and which items are not included in any of the items upon which proof of claim has hereinbefore been made after allowing credits on such sum last named to the amount of Nineteen Thousand Six Hundred Thirty Dollars and Forty-two Cents ($19,630.42), leaving a net balance on account of the matters in this paragraph referred to of Five Thousand Nine Hundred Eighty-two Dollars and Sixty-two Cents ($5,982.62). This statement of account includes all items upon which proof has hereinbefore been specifically made except those set forth in paragraphs Third, Seventh and Tenth hereof.

Affiant further states that the amounts for which claim is hereby made are justly due and owing unto the claimant by defendant company and that there are no set-offs or counter-claims against any of the

same other than hereinbefore specifically set forth and other than as set forth in said Exhibit A.

STEWART H. PATTERSON.

Sworn and subscribed to before me this 30th day of July, 1915.

A. G. SWAN,
Notary Public.

EXHIBIT A.

GREAT SHOSHONE & TWIN FALLS WATER POWER CO. JULY 30, 1915.

In account with

AMERICAN WATER WORKS & ELECTRIC CO., Inc.

1913	
July 7—Balance Open Account to A. W. W. & G. Co.	$551,776.62
Sept. 30—Advances by Receivers of A. W. W. & G. Co.	2,500.00
Oct. 31—Advances by Receivers of A. W. W. & G. Co.	2,500.00
1914	
Apr. 30—Advances by Receivers of A. W. W. & G. Co.	19.02
Apr. 30—Cash advanced to Commonwealth Trust Co.	105,703.90
Apr. 30—Cash of A. W. W. & G. Co. impounded and applied on notes of Gt. Sho. & T. F. W. P. Co. by banks	67,590.58
Apr. 30—Interest and protest fees on bank loans to 5/1/14	11,218.25

June 4—Book account of T. Falls, Salmon River L. & W. Co. against Gt. Sho. & T. F. W. P. Co. assigned.....	5,529.95
June 5—W. L. Clark Co., Insurance....	324.85
Ed Ball Agency Premium on Fulton Bond	10.00
Westinghouse Elec. & Mfg. Co., Interest on Note	86.25
June 26—Westinghouse Elec. & Mfg. Co., Interest on Notes.....	84.33
July 23—Book account of T. Falls No. Side L. & W. Co. against Gt. Sho. & T. F. W. P. Co., assigned	114,024.19
Aug. 18—Evening Post Printing Office, Printing	115.25
Aug. 18—Evening Post Printing Office, Printing	28.00
Sept. 2—Book account of the North Side Canal Co., Ltd., against Gt. Sho. & T. F. W. P. Co., assigned.....	32.59
Sept. 29—Westinghouse Elec. & Mfg. Co., Interest on Notes	191.34
Oct. 2—Book account T. Falls No. Side Investment Co., Ltd., against Gt. Sho. & T. F. W. P. Co., assigned.....	29,029.27
Oct. 5—Interest on Bank Loans to 8/1, 1914	4,093.71
Oct. 22—Book account Sou. Idaho Telephone Co., Ltd., against Gt. Sho. & T. F. W. P. Co., assigned.....	117.38

Oct. 28—Delaware Trust Co., Stock Transfer Book	2.00
Oct. 5—Westinghouse Elec. & Mfg. Co., Interest on Notes	64.62
Oct. 5—Chubb & Son, Insurance	.20
Oct. 5—Kirkland & Yardly, Insurance	106.50
Oct. 31—Amounts paid out under contracts of Gt. Sho. & T. F. W. P. Co., dated July 29 and 31, 1914, guaranteed by A. W. W. & E. Co., Inc.	24,497.50
Nov. 16—Chubb & Son, Insurance	.10
Dec. 23—Filing Annual Report	2.00
1915	
Jan. 31—Interest on Bank Loans to Feb. 2, 1915	8,025.03
Feb. 16—Chubb & Son, Insurance	.10
July 30—Interest on Bank Loans to Aug. 1, 1915	8,025.03
Less following credits:	
1914	
Apr. 30—On account assignment claim against Twin Falls Oakley Land & Water Company	5,056.28
July 22—On account assignment claim against Idaho Southern Railroad Co.	14,571.59
Sept. 3—Received from R. L. Kester on account	2.55

Endorsed: Filed August 9, 1915.
A. L. Richardson, Clerk.
By Pearl E. Zanger, Deputy.

(Title of Court and Cause.)
Equity No. 509.

ORDER ALLOWING CLAIM OF AMERICAN WATER WORKS AND ELECTRIC COMPANY.

It appearing to the Court that claims against the estate of the defendant above named have been filed herein as required by order of this Court with respect thereto, among which was that of American Water Works and Electric Company, and it also appearing that thereafter it was by the Court ordered that any person interested and so desiring should on or before January 17, 1916, file objections to any claim and join issue thereon and that trial of such issues should be had on February 14, 1916; and it further appearing on said February 14, 1916, that no objection had been made to the claim of American Water Works and Electric Company filed as hereinbefore mentioned, the same on that day was, in open Court, and is now allowed and approved.

FRANK S. DIETRICH,
November 3rd, 1916. District Judge.

Endorsed: Filed Nov. 3rd, 1916.
W. D. McReynolds, Clerk.
By Pearl E. Zanger, Deputy.

(Title of Court and Cause.)
Equity No. 509.

STATEMENT ON HEARING OF PETITION OF BOISE TITLE AND TRUST COMPANY FOR PREFERENCE AND INDEMNITY.

BE IT REMEMBERED: That on the 8th day of

April, 1916, the Boise Title and Trust Company presented to the Court and filed herein its petition for preference and indemnity herein, which petition is in words and figures as follows:

(Title of Court and Cause.)

"To the Judge of the District Court of the United States, for the District of Idaho.

Comes now the Boise Title and Trust Company, a corporation organized and existing under the laws of the State of Idaho, and represents to and petitions the Court as follows:

1. That the Boise Title and Trust Company is a corporation duly organized and existing under the laws of the State of Idaho, and was such corporation at all of the times hereinafter mentioned; that it is a part of the business of the corporation to become surety upon bonds of the character hereinafter mentioned.

2. That on the 8th day of June, 1914, and for a long time prior and subsequent thereto, the defendant, the Great Shoshone and Twin Falls Water Power Company, was a corporation duly organized and existing under the laws of the State of Delaware and duly empowered to do business in the State of Idaho.

3. That during said time, it was the owner of an electric power plant located at Lower Salmon Falls in Gooding County, State of Idaho, and a power plant situated at Shoshone Falls in Lincoln County, State of Idaho, and upwards of two hundred miles of transmission lines extending from Oakley, Idaho, to Mountain Home, Idaho, in an easterly and westerly

direction and from Hollister to Shoshone, in the State of Idaho, in a northerly and southerly direction, and that a considerable portion of said transmission lines were situated in said Lincoln County.

4. That prior to the month of April, 1914, the Shoshone Light and Power Company, a corporation, owned and operated an electric light and water works system in the town of Shoshone, in said Lincoln County, State of Idaho.

That prior to said month of April, a contract was made between the said Shoshone Light and Power Company and the Great Shoshone and Twin Falls Water Power Company, a copy of which contract has been filed in these proceedings and is hereby referred to and made a part hereof; that under the terms of said contract, the property of said Shoshone Light and Power Company, consisting of an electric light plant and a waterworks plant, was to be sold to the Great Shoshone and Twin Falls Water Power Company under certain conditions; that a deed for said property had been theretofore placed in escrow for delivery to the Great Shoshone and Twin Falls Water Power Company upon payment by it of the purchase price of said property;

That under the terms of said contract, a portion of the income from said property was to be applied to operating expenses and the balance of the funds were to be applied upon the purchase price of the property until the full amount thereof had been paid as will more fully appear by said contract;

That prior to the month of April, 1914, the Great

Shoshone and Twin Falls Water Power Company took possession of said property under said contract belonging to the Shoshone Light and Power Company and collected and received all the income therefrom, said income being applied as hereinbefore stated.

5. That during said period while said Great Shoshone and Twin Falls Water Power Company was in possession of the said property of the Shoshone Light and Power Company and operating the same, an accident occurred whereby a certain building and the contents belonging to one J. W. Newman was destroyed by fire; that it was claimed by said Newman that the destruction of said building was occasioned by the faulty construction of the power lines of the Shoshone Light and Power Company, and the improper maintenance and operation thereof by the Great Shoshone and Twin Falls Water Power Company as will more fully appear by a copy of the complaint filed by said Newman in the District Court, in and for Lincoln County, a copy of which said complaint is hereunto attached and made a part hereof and marked Exhibit "A."

6. That in the said suit in which said complaint above mentioned was filed, said J. W. Newman recovered judgment against the Great Shoshone and Twin Falls Water Power Company in the sum of ten hundred seventy-nine and eighty hundredths ($1079.80) dollars, said judgment being rendered on the 23rd day of April, 1914; that said judgment thereupon became a lien upon all of the property of the Great Shoshone and Twin Falls Water Power

Company situate in the said Lincoln County, including such interest as the Great Shoshone and Twin Falls Water Power Company had in the property of the Shoshone Light and Power Company; that the Great Shoshone and Twin Falls Water Power Company desired to appeal from said judgment and the said J. W. Newman threatened the issuance of execution in said action; that the said Great Shoshone and Twin Falls Water Power Company desired to prevent the issuance of any execution and to obtain the release of the judgment lien procured in said case.

7. That said Great Shoshone and Twin Falls Water Power Company on or about the 8th day of June, 1914, requested the Boise Title and Trust Company to execute a surety bond for the purpose of preventing the levy of an execution upon the property of the said company and for the purpose of an appeal in said cause;

That the said Boise Title and Trust Company, petitioner herein, at the said request of the said defendant, did on the 8th day of June, 1914, execute the bond, a copy of which is hereto attached and made a part hereof and marked Exhibit "B," that the request for the execution of said bond was made and said bond was executed within six months prior to the appointment of a receiver herein; that the said Great Shoshone and Twin Falls Water Power Company was at the time of making said request and at the time of issuing said bond and at all times prior to the month of July, 1915, the owner of all of the

bonds issued by the Great Shoshone and Twin Falls Water Power Company, and that there were at that time no bonds of said company outstanding except such as were owned by said company, and that said request for the execution of said bond was made for the protection and benefit of said bonds and the owner thereof; that prior to said time, said bonds had been pledged to secure an issuance of notes of the said Great Shoshone and Twin Falls Water Power Company; that by preventing the levy of an execution, the Great Shoshone and Twin Falls Water Power Company was permitted to obtain title to the property of the Shoshone Light and Power Company under the terms of the contract hereinbefore mentioned; that in the month of July, 1915, a default having occurred in the payment of the interest or principal of some of said notes secured by a pledge of said bonds, said bonds were sold to satisfy said pledge; that such sale was after the appointment of the receiver herein and was without notice to him, and without notice to this Court and also without notice to the petitioner herein.

8. That the Great Shoshone and Twin Falls Water Power Company was at all times subsequent to the year 1913, a subsidary corporation of the American Waterworks and Electric Company, said last-named company holding seventy per cent or more of the stock of said corporation and being in charge of its financial affairs.

That about the month of February or March, 1915, an understanding was had between said American

Water Works and Electric Company and other electrical interests whereby plans for a proposed merger of the interests were tentatively or otherwise agreed upon and that the sale of the said bonds in satisfaction of said pledge was made in pursuance of said reorganization arrangement.

9. That the Supreme Court of the State of Idaho on or about the 24th day of March, 1916, affirmed the decision of the District Court, in and for Lincoln County, in the said suit in which J. W. Newman was plaintiff against the Great Shoshone and Twin Falls Water Power Company; that petitioner will now be required, under the terms of said decision, to make payment upon the said bond.

10. That at the time of the execution of said bond, the American Water Works and Electric Company had a manager in charge of said property of the Great Shoshone and Twin Falls Power Company and who was directing the affairs thereof, and that said bond was executed by the said manager as Manager of said Great Shoshone and Twin Falls Water Power Company as more fully appears by said Exhibit "B."

That the merger of electric properties arranged for between the American Water Works and Electric Company and other electrical interests has been fully consummated and said property is now owned and operated, together with other power properties, by the Electric Investment Company.

That after the sale of said bonds for the satisfaction of said pledge, a suit for foreclosure was brought in this Court upon said bonds and the trust deed

securing the same, which suit is entitled "The Equitable Trust Company vs. Great Shoshone and Twin Falls Water Power Company, et al., No. 526, in this Court, to which suit and the proceedings therein reference is hereby made; that said suit was one of the means used on behalf of the American Water Works and Electric Company to carry the said merger of the power properties into effect, including the properties of the defendant company.

11. That at the time of the accident mentioned in the complaint, Exhibit "A," and at the time of the entering of the judgment in the suit above mentioned, and at the time of the execution of the bond, the contract between the Great Shoshone and Twin Falls Water Power Company and the Shoshone Light and Power Company was in force and effect and was being carried out by payments made out of the income from said property; that said property was purchased and paid for from the income derived therefrom in pursuance of the contract to which reference is hereby made.

12. That the said Great Shoshone and Twin Falls Water Power Company at the time of the rendition of said judgment and the threatened issuance of execution had on hand funds used for the payment of employees and for the repair and up-keep of the property, which funds were subject to levy under said execution; that it also had on hand at said time, equipment of a greater value than the amount of said judgment, which said equipment was after said time added to the property and included in the receiver's sale.

Wherefore, Petitioner prays that the receiver herein be required to liquidate the obligation on said bond and to pay and discharge the judgment rendered and entered in the aforesaid case in the District Court of the Third Judicial District of the State of Idaho, wherein J. W. Newman was plaintiff and the said Great Shoshone and Twin Falls Water Power Company was defendant, and that the receiver save your petitioner harmless from all costs and liabilities on account of the giving of said bond.

BOISE TITLE AND TRUST COMPANY,
By S. H. Hays, President,
Petitioner.

EXHIBIT "A."

In the District Court of the Fourth Judicial District of the State of Idaho, in and for the County of Lincoln.

J. W. NEWMAN, Plaintiff,

vs.

GREAT SHOSHONE AND TWIN FALLS WATER POWER COMPANY, a Corporation,
Defendant.

COMPLAINT.

Plaintiff complains of the defendant and for cause of action alleges:

1.

That at all times hereinafter mentioned the defendant was, and now is, a corporation organized and existing under and by virtue of the State of Delaware.

2.

That the plaintiff at all times hereinafter mentioned was, and now is, the owner of a portion of Block Forty (40) of the Town of Shoshone, Lincoln County, State of Idaho, and that up to and including the 11th day of April, 1913, the said defendant was the owner of a certain corrugated iron barn situated on said premises, which said barn was of the reasonable worth and value of $650.00, and the said plaintiff, up to and including the last-named date was the owner of certain personal property located in said barn, described as follows:

One team of horses of the reasonable worth and value of	$ 300.00
One ton of oats of the reasonable worth and value of	30.00
One ton of hay of the reasonable worth and value of	8.00
Two sets of harness of the reasonable worth and value of	70.00
Thirteen pack outfits of the reasonable worth and value of	156.00
Seven riding saddles of the reasonable worth and value of	175.00
Seventy-five sheep pelts of the reasonable worth and value of	66.25
150 ft. of cotton hose of the reasonable worth and value of	15.00
Three screen doors of the reasonable worth and value of	3.00

Horseshoeing outfit of the reasonable worth and value of	12.00
Ten tents, at $10.00, of the reasonable worth and value of	100.00
Making a total reasonable worth and value of said property of	$1,586.00

3.

That in the year 1914 the Shoshone Light & Water Company, a corporation organized and existing under and by virtue of the laws of the State of Idaho, secured a franchise from the Village of Shoshone, Lincoln County, State of Idaho, for a term of years permitting said company to build, maintain and operate poles, wires, stations and appurtenances thereto, for the purpose of carrying on an electric light and power business within the said town of Shoshone, Idaho. That in the year 1904, pursuant to the terms of said franchise, and in furtherance of their said business, the said Shoshone Light & Water Company erected poles along the streets and alleys of the said town of Shoshone and strung along the said poles a system of wires, appurtenances and appliances charged with a dangerous and life destroying force and current, known as electricity, and that said poles and wires were strung along Boise Street in said Village of Shoshone.

4.

That the said Shoshone, Light & Water Company owned, maintained and operated the said electric light and power system up to and including on or about July 1, 1912, at which said time the defendant,

Great Shoshone & Twin Falls Water Power Company purchased and took over from the said Shoshone Light & Water Company said system in its entirety, together with the franchise owned by the said Shoshone Light & Water Company, and the said Great Shoshone & Twin Falls Water Power Company has during all the time since on or about July 1, 1912, up to and including the date hereof, maintained and operated the said electric light and power system, a part of which is the maintenance and operation of the said system appurtenances and appliances, charged with a dangerous and life destroying force and current, known as electricity, along Boise Street in said Village of Shoshone, Lincoln County, State of Idaho.

5.

That during the fall of 1911, the said Shoshone Light & Water Company, desiring to extend their said system of wires from the north side of Boise Street at a point opposite Block Forty (40) in the town of Shoshone, Lincoln County, State of Idaho, to a point on the south central part of Block Fifty (50), town of Shoshone, Lincoln County, State of Idaho, but not for the use or benefit of this plaintiff herein, extended its wires diagonally across the said Block Forty (40), and across the property of this plaintiff herein, that the said Shoshone Light & Water Company carelessly failed and neglected to erect suitable poles or any pole at all to carry said wires from the said point on Boise Street to the said point in Block Fifty (50), but in direct contravention of the rights

of this plaintiff herein, and without the knowledge of, permission or consent of the plaintiff, the said Shoshone Light & Water Company attached said wires to the said plaintiff's corrugated iron barn, running the same lengthwise along the side of said barn at a distance of only about two inches from the side of the said barn. That the said Shoshone Light & Water Company, its agents and servants, carelessly and negligently fastened the said wires to the side barn, leaving the same loose and swaying, thereby through their said negligence and carelessness, permitting said wires to come in contact with the side of plaintiff's said barn.

6.

That from and after on or about July 1, 1912, the date of the purchase of said light and power system, together with the poles, wires and appurtenances thereto, from the said Shoshone Light & Water Company by the Great Shoshone & Twin Falls Water Power Company, up to and including April 11, 1913, the said Great Shoshone & Twin Falls Water Power Company negligently and carelessly maintained and operated the said wires, poles and appurtenances which extended from the north side of Boise Street across said Block Forty (40) to a point in said Block Fifty (50), and which were attached to the side of said plaintiff's barn in a careless and negligent manner by carelessly and negligently, without any fault of the plaintiff herein, permitting said wires to remain loose and sway and strike against the side of said plaintiff's barn, and the said defendant negli-

gently and carelessly failed to exercise and use proper care, diligence and skill in operating, inspecting and maintaining said plant, wires and other appurtenances and appliances and system of wires, and carelessly and negligently operated and permitted its said wires to remain attached to the said plaintiff's barn, without having the said wires properly insulated, attached and fastened.

7.

That by reason of the said Shoshone Light & Water Company, its agents, employes and servants, failing to exercise and use proper care, diligence, material and skill in putting in the said plant, wires and other appurtenances as aforesaid, and by reason of the defendant, its agents, employes failing to exercise and use proper care, diligence, material and skill in operating, inspecting and maintaining its plant, wires and other appurtenances as aforesaid, defendant did, on the 11th day of April, 1913, and without fault of the plaintiff, negligently and carelessly permit a current of electricity to pass from the said wires into and through the side of plaintiff's said barn, said current thereby coming in contact with said barn and the contents thereof, and did thereby set fire to said barn and the contents thereof, which said fire wholly and totally burned up and destroyed all of the said personal property as described in paragraph two hereof, together with the said barn, to the plaintiff's damage in the sum of $1,586.00.

Wherefore plaintiff prays judgment against the defendant for the sum of $1,586.00, together with

interest thereon at the rate of 7% per annum from April 11, 1913, and costs of suit.

(Signed) JAMES R. BOTHWELL,
Attorney for Plaintiff,
Residence: Shoshone, Idaho.

Duly verified.

Filed Sept. 10th, 1913, at 4:35 P. M.
Harry W. Anderson, Clerk.

EXHIBIT "B."

In the District Court of the Fourth Judicial District of the State of Idaho, in and for the County of Lincoln.

J. W. NEWMAN, Plaintiff,

vs.

GREAT SHOSHONE AND TWIN FALLS WATER POWER COMPANY, a corporation, Defendant.

UNDERTAKING ON APPEAL.

WHEREAS, the defendant in the above entitled action has appealed to the Supreme Court of the State of Idaho, from the judgment made and entered against it in said action in the said District Court in favor of the plaintiff in said action on the 23rd day of April, 1914, for $1,079.80, gold coin of the United States, and $..... costs of suit and from the whole thereof, and also from the order refusing said defendant a new trial made and entered in the minutes of the said Court on June 5th, 1914.

NOW, THEREFORE, in consideration of the premises and of such appeal, the undersigned, the

Great Shoshone and Twin Falls Water Power Company, a corporation, as principal, and the Boise Title and Trust Company, a corporation organized and existing under the laws of the State of Idaho, as surety, do hereby jointly and severally undertake and promise on the part of the defendant, that the said defendant will pay all damages and costs which may be awarded against it on said appeals or on a dismissal thereof, not exceeding $300.00, to which amount we acknowledge ourselves jointly and severally bound; and,

WHEREAS, the defendant is desirous of staying the execution of the said judgment so appealed from, we do further in consideration thereof and of the premises, jointly and severally undertake and promise and do acknowledge ourselves further jointly and severally bound in the further sum of $2,159.60, gold coin of the United States, being double the amount named in the said judgment that if the said judgment appealed from or any part thereof be affirmed, or the appeal be dismissed, the defendant will pay in the United States gold coin the amount directed to be paid by the said judgment, or a part of such judgment as to which such judgment shall be affirmed, if affirmed only in part, and all damages and costs which may be awarded against the defendant upon the appeal, and that, if the defendant does not make such payment within thirty days after the filing of the remittitur from the Supreme Court in the Court from which the appeal is taken, judgment may be entered on motion of the plaintiff in his favor against

the undersigned principal and surety for said sum of $1,079.80, together with the interest that may be due thereon and the damages and costs which may be awarded against the defendant upon the appeal.

WITNESS our hands and seals this 8th day of June, 1914.

GREAT SHOSHONE & TWIN FALLS WATER POWER CO.,
By WM. T. WALLACE.
BOISE TITLE AND TRUST COMPANY,
By W. J. ABBS,
Secretary.

State of Idaho,
County of Ada,—ss.

S. H. HAYS, being first duly sworn, deposes and says that he is the President of the Boise Title and Trust Company; that said Boise Title and Trust Company is a corporation duly organized and existing under the laws of the State of Idaho under Sections 2961 to 2967 of the Revised Codes of said State.

S. H. HAYS.

SUBSCRIBED AND SWORN to before me this 8th day of June, 1916.

(Seal) MARGARET RYAN,
Notary Public.

That leave to file the same was thereupon granted by the Court and hearing thereon was set for April 6, 1916. The said petition was thereupon filed in accordance with such permission and the following notice was given to William T. Wallace and the various attorneys appearing on behalf of creditors and others in the above entitled cause:

(Title of Court and Cause.)

NOTICE.

TO WILLIAM T. WALLACE, Receiver, and the various attorneys appearing on behalf of Creditors and others in the above entitled cause.

Please take NOTICE that the Boise Title & Trust Company will on April 6th, 1916, at the hour of two o'clock P. M., at the court room of the above entitled Court move said Court to authorize the filing of the petition and fix time for hearing for the allowance of the claim of the Boise Title & Trust Company arising out of the giving of an appeal bond and a bond for a stay of execution in the case of J. W. Newman vs. the Great Shoshone and Twin Falls Water Power Company; the judgment in which case was affirmed by the Supreme Court on or about the 24th day of March, 1916.

This application is made at this time for the reason that, at the suggestion of the Court, the claim of the Boise Title & Trust Company was not heretofore presented because it had not yet accrued and the decision of the Supreme Court in the above cause had not been rendered and for that reason it was not known whether or not any liability would ensue.

(Signed) S. H. HAYS,
Attorney for Boise Title & Trust Company.

That at the time set for the hearing of the said petition the American Water Works and Electric Company, whose claim had theretofore been duly filed herein and allowed by the Court as a general creditor, and William T. Wallace as Receiver of

Great Shoshone and Twin Falls Water Power Company appeared by their solicitors and resisted the said petition.

Whereupon the matter was continued for further hearing. Thereafter, on the 10th day of April, 1916, a stipulation of facts in the matter of the said petition of Boise Title and Trust Company was duly entered into by and between the Solicitors for the petitioner and the Solicitors for American Water Works and Electric Company and other creditors, and for William T. Wallace as Receiver of Great Shoshone and Twin Falls Water Power Company, which stipulation is in words and figures as follows, to-wit:

In the District Court of the United States for the District of Idaho, Southern Division.

GUY I. TOWLE, Complainant,

vs.

GREAT SHOSHONE & TWIN FALLS WATER POWER COMPANY, a corporation, Defendant.

STIPULATION OF FACTS IN THE MATTER OF THE PETITION OF THE BOISE TITLE AND TRUST COMPANY FOR LIQUIDATION OF BOND.

It is hereby STIPULATED AND AGREED that the following are facts to be considered in determining the said petition of the Boise Title and Trust Company.

1. That the Boise Title and Trust Company is a corporation as stated in the petition.

2. That the Great Shoshone and Twin Falls Water Power Company was a corporation duly organized and existing under the laws of the State of Delaware, and duly empowered to do business in the State of Idaho; that it commenced doing business in the State of Idaho about the year 1907 and continued down to the appointment of the Receiver herein.

3. That said Power Company owned an electric power plant in Gooding County, State of Idaho, at Lower Salmon Falls; also a power plant at Shoshone Falls in Lincoln County, State of Idaho, and upwards of two hundred miles of transmission lines in the vicinity of said plants, a large portion of which were in Lincoln County, State of Idaho.

4. That the Shoshone Light and Water Company was a corporation organized under the laws of the State of Idaho, doing business at the town of Shoshone in Lincoln County, State of Idaho; that it owned and operated a power plant and transmission lines in said town, and also a waterworks plant; that the said Shoshone Light and Water Company was in possession and control of said electric power plant and waterworks plant in the year 1912; that during said year a contract was made with the Great Shoshone and Twin Falls Water Power Company whereby a deed was placed in escrow by the Shoshone Light and Power Company with the agreement that said deed should be delivered to the Great Shoshone and Twin Falls Water Power Company when a certain amount, to-wit, the sum of $55,000.00, with interest, was paid; that in said contract it was provided that

the Great Shoshone & Twin Falls Water Power Company should take possession of said property and receive the income thereof, and that it should apply sixty per cent of the income to the Shoshone Light and Water Company upon the purchase price of said property. A copy of the agreement is hereto annexed. That the Great Shoshone & Twin Falls Water Power Company went into possession of said property thereafter in the year 1912, and was in possession thereof at the time of the appointment of the Receiver herein; that the Receiver has remained in possession and has carried out the terms of said contract, and that there has been paid out of said income on account of the purchase price of said property by the Receiver under said contract in excess of the sum of $7,000.00 and prior to the time of the appointment of the Receiver there was paid upon said contract between the Great Shoshone and Twin Falls Water Power Company out of said income more than $1,500.00.

That on the 11th day of April, 1913, an accident occurred whereby a certain barn belonging to J. W. Newman was destroyed by fire; that said Newman claimed that the fire was caused by a current of electricity passing through electric wires and coming in contact with said barn, or its contents, said barn being situated in the town of Shoshone, in said Lincoln County. It was claimed that the wires causing the accident were in the possession of and operated by the Great Shoshone and Twin Falls Water Power Company, but that they had been constructed by the Shoshone Light and Water Company.

The said Newman filed a complaint on account of said accident on the 10th day of September, 1913, a copy of which is attached to the petition herein and made a part thereof; that in said suit brought by said Newman against said Power Company, a judgment was rendered on the 24th day of April, 1914, in favor of said Newman and against Power Company for the sum of $1,079.80, and costs of suit; that said Newman threatened to have an execution issued and to levy upon the property of the defendant Power Company; that said Power Company thereupon requested the Boise Title and Trust Company to give a bond upon appeal from said judgment and for the stay of execution; that said bond was executed on the 8th day of June, 1914, and was duly filed in said cause on the 12th day of June, 1914, and thereafter execution was duly stayed; that a copy of said bond is attached to the petition herein; that the appeal in said cause was pending at the time of the appointment of the Receiver herein; that the appeal was further prosecuted by the Receiver after his appointment and briefs prepared and arguments made in the Supreme Court of the State of Idaho, upon said appeal, the hearing thereof having been had in the month of January, 1916.

That on the 24th day of March, 1916, the Supreme Court of the State rendered a judgment affirming the judgment of the lower Court in said cause, and that the Boise Title and Trust Company will be required to pay said bond unless the same is ordered paid by the Receiver herein.

That at the time of the execution of said bond, to-wit, on the 8th day of June, 1914, and also at the time of the filing of said bond, and at the time the request therefor was made by the Great Shoshone and Twin Falls Water Power Company, said company had a large amount of real property situate in Lincoln County, State of Idaho, upon which said judgment was a lien, subject, however, to any lien of the Equitable Trust Company, Trustee; that said Power Company was at the time acquiring the title to the property of the Shoshone Light and Power Company in the town of Shoshone where the accident hereinbefore mentioned occurred upon the power lines then owned by the Shoshone Light and Water Company but in the possession of and being operated by the Great Shoshone and Twin Falls Water Power Company; that the property of the said Shoshone Light and Water Company was acquired by the Great Shoshone and Twin Falls Water Power Company out of the income from said property, payments being made each month, an amount in excess of the claim of petitioner having been paid in this way prior to the execution of said bond and a large amount in excess of petitioners' claim having been paid subsequent to the execution of said bond and before the appointment of a Receiver herein, and that since the receivership herein, the Receiver has paid out of the income of said property on account of the purchase price therefor, a sum in excess of $7,000.00. That the Great Shoshone and Twin Falls Water Power Company had on hand at the time of the giving and

filing of said bond, moneys in excess of the sum of $1,500.00, which funds were held for use and were thereafter used for the payment of employees and the running expenses of the property, and that execution might have been levied upon said funds; that said company also had on hand at the time of the giving and filing of said bond supplies of various kinds exceeding in value the sum of $1500.00, which supplies were purchased to be used and were actually used for repairs, upkeep and additions to the property in order to keep it a going concern; that said Power Company also had at said time equipment in excess of the value of $1500.00, which equipment consisted of various electrical devices kept on hand for sale to customers, such as lamps, heaters, stoves, vacuum cleaners and other like appliances; that said company was also the owner of property which it claimed was included in a mortgage or trust deed given to secure the bonds of the company, but which ownership might have been contested and was contested in the foreclosure case herein referred to.

5. That on the 1st day of May, 1910, a mortgage was given by the Great Shoshone and Twin Falls Water Company to secure an issue of bonds; that on the 21st day of June, 1911, a supplementary mortgage was given; that on the 7th day of April, 1913, a second mortgage was given upon the property of the company; that the bonds of the company, instead of being sold to purchasers, were pledged as collateral to secure an issue of notes, the title to said bonds being retained by the Great Shoshone and Twin Falls

Water Power Company; that said company remained the owner of said bonds until about the month of April, 1915, when said bonds were sold under the terms of the pledge, at Pittsburg, Pennsylvania, such sale being without notice to the Receiver, this Court or to the petitioner; that, after said sale, a foreclosure suit was commenced in this Court for the purpose of recovering upon said bonds and foreclosing the mortgage or trust deed securing the same; that said suit was brought in this Court after the appointment of the Receiver herein and is entitled the Equitable Trust Company against the Great Shoshone & Twin Falls Water Power Company et al., and reference is hereby made to the records and files in said action, which are made a part of this stipulation, together with the records and files in this action;

That the Great Shoshone and Twin Falls Water Power Company was organized for the purpose of building electric power plants and transmission lines in a district then largely undeveloped; that it was a subsidary corporation to the American Water Works and Guarantee Company; that said last named company was in the hands of a Receiver in the year 1913, and that its assets were taken over by the American Water Works and Electric Company, and that the Great Shoshone and Twin Falls Water Power Company then became a subsidary corporation to the said last named company, and that it placed William T. Wallace in charge of the Great Shoshone & Twin Falls Water Power Company as general manager thereof; that the income of the Great Shoshone and Twin Falls Water Power Company was insufficient

to pay its operating and other expenses and interest upon its outstanding obligations.

The above are all the facts which the counsel for the respective parties now consider to be material, but if it should be found by the Court that additional facts may be necessary for the purpose of the determination of this case, then the right is reserved on the part of both parties to present any additional facts that may exist either by way of stipulation or by way of evidence before the Court.

S. H. HAYS,

April 8, 1916. Attorney for Petitioner.

WYMAN & WYMAN,

Solicitors for Equitable Trust Co., Guaranty Trust Company, American Water Works and Electric Co., and for the Receiver, herein.

AGREEMENT.

THIS MEMORANDUM OF AGREEMENT, made by and between Shoshone Light & Water Company, a corporation, of Shoshone, Idaho, party of the first part, and the Great Shoshone & Twin Falls Water Power Company, a corporation of Delaware, the party of the second part:

WITNESSETH, Party of the first part has this day transferred and turned over to the party of the second part all power plant transmission lines, fixtures, pumping plant, water mains, real estate and all other property owned by said party of the first part which is shown by the inventory of June 1, 1912,

and by the abstract of title furnished by first party to second party, in consideration of the sum of FIFTY-FIVE THOUSAND DOLLARS ($55,000) paid and to be paid as follows, to-wit: FIFTEEN THOUSAND ($15,000) DOLLARS cash, the receipt whereof is hereby acknowledged, and Forty Thousand ($40,000) Dollars with interest thereon at the rate of six per cent (6%) per annum, to be paid out of the gross earnings of said plants, as follows:

Sixty per cent (60%) of the gross earnings of said plants to be paid by party of the second part to party of the first part each and every month until the full amount of Forty Thousand Dollars, together with interest thereon from this date at the rate of six per cent. per annum is fully paid.

Executed in duplicate this 1st day of July, 1912.

SHOSHONE LIGHT AND WATER COMPANY, LIMITED,

By FRED W. GOODING, President.

GREAT SHOSHONE & TWIN FALLS WATER POWER COMPANY, LTD.,

By D. C. MacWATTERS, Vice-President.

THE FIRST NATIONAL BANK OF SHOSHONE.

Shoshone, Idaho, Feb'y 12th, 1913.

Received of F. C. Pierce, this 12th day of February, 1913, one certain deed executed by the Shoshone Light & Water Company, Limited, in favor of the Great Shoshone and Twin Falls Water Power Company, executed as of this date, and conveying certain properties as evidenced by Parcel First to Parcel Ninth, both inclusive, thereof.

The said deed to be held by this bank as per the terms and conditions of one certain Escrow Agreement made and entered into on February 6th, 1913, by and between the Shoshone Light & Water Company, Limited, party of the first part, and the Great Shoshone and Twin Falls Water Power Company, party of the second part, and which agreement has this day been received by this bank with the said deed first above mentioned.

THE FIRST NATIONAL BANK OF SHOSHONE,

By W. HAIL HORNE, Cashier.

Thereafter the said petition came regularly on for hearing upon the said stipulation and such of the records and files in said cause as were pertinent, to-wit, the complaint herein, the order appointing Receiver herein, the claim and allowance of American Water Works and Electric Company, and the said stipulation of counsel hereinbefore contained.

Thereafter, on May 1st, 1916, the said matter having been argued by counsel and submitted, the Court rendered its decision as follows:

(Title of Court and Cause.)

DECISION ON APPLICATION OF BOISE TITLE & TRUST COMPANY FOR ALLOWANCE OF PREFERRED CLAIM.

May 1, 1916.

S. H. Hays, Attorney for Petitioner.

Wyman & Wyman, Attorneys for certain creditors.

DIETRICH, DISTRICT JUDGE:

A petition is presented by the Boise Title & Trust

Company in a creditors' suit brought against the judgment debtor for the purpose of administering its insolvent estate and applying the proceeds thereof to the payment of its debts. Concurrently with the creditors' suit a foreclosure suit has been prosecuted by the trustee for the bondholders, and under the decree therein all of the property of the judgment debtor has been foreclosed upon and sold, but final distribution of the proceeds of the sale has not yet been made. The petitioner is an Idaho corporation, having among other powers, that of becoming surety for litigants upon appeal and supersedeas bonds. Upon April 24, 1914, in one of the State Courts, a judgment was entered against the defendant company in favor of one Newman for $1,079.80 as damages for the destruction of certain property as the result of faulty construction of an electric transmission line. The line had been installed by a company known as the Shoshone Light & Water Company, but at the time of the fire it was being operated by the defendant under a contract by which it was given possession of, and was to purchase, the system, of which the line was a part. Newman having threatened to issue execution, the defendant sued out an appeal to the Supreme Court of the State, and in that connection the applicant, upon the request of the defendant, and presumably for a valuable consideration, executed an appeal and supersedeas bond. The judgment has been affirmed, and the applicant now prays that the Receiver be required to satisfy it. The prayer is opposed by the Receiver and certain creditors of the estate, secured and unsecured.

The disposition of the petition involves two questions: (1) Is there a rule or principle by which a surety for a public service corporation is generally to be deemed to be a preferred creditor in case of its insolvency? And (2), if there is no such general rule, are the circumstances here exceptional and of such character as to warrant the relief prayed for?

The first question, it is thought, must be answered in the negative. While in the few and conflicting cases upon the subject some support may be found for the affirmative, the weight of both authority and reason is in my judgment against such a rule. In what the petitioner puts forth as the leading case upon the subject, (*Union Trust Co. v. Morrison*, 125 U. S. 591), the conclusion reached was the result of what were deemed to be exceptional circumstances widely differing from those here involved. In *Jones v. Central Trust Co.*, 73 Fed. 568 (6th C. C. A.), the syllabus fairly states the facts: "Certain property of the railroad company which was covered by mortgages was attached by a creditor who had secured a judgment against the company. Thereupon, in order to preserve the unity of the property and keep the railroad a going concern, the trustees in the mortgages caused such property to be replevined and bonds to be given with sureties for the return of the property or for the payment of its value, if adjudged to be subject to the attachment. The property was ultimately adjudged to be so subject, but in consequence of its having been taken into possession by a Receiver appointed in a foreclosure suit instituted by

the trustee it was impossible for the sureties on the replevin bonds to return the property, and executions were directed to issue against them for its value." Under these circumstances it was held that it was proper to direct the Receiver to pay the claim in preference to the mortgage lien. The facts were not closely analagous to those in the instant case, and in the light of the later decision of the same Court in *Whiteley vs. Central Trust Company of New York*, 76 Fed. 74, manifestly the inference cannot properly be drawn that the Court intended to establish or recognize the general rule under consideration. In the Whiteley case Judge Lurton analyses the Morrison case, and after considering the question at length, reaches the conclusion that surety upon a supersedeas bond given by a railroad company while apparently solvent and not in default, if compelled, after the insolvency of the company, to pay the judgment appealed from, is not entitled to be repaid from the proceeds of the property of the company in preference to the mortgagee thereof. This conclusion is clearly supported by the decision of Justice Brewer while sitting as a circuit judge in the case of *Blair v. Railroad Co.*, 23 Fed. 532, and by the more elaborate opinion of Judge Jenkins in *Farmers Loan & Trust Co. v. N. P. R. Co.*, 68 Fed. 36. The decision rendered by Judge Hanford of the Washington district in the Farmers Loan & Trust Company case (71 Fed. 245), strongly tends to support the petitioner's contention, but the ultimate conclusion there largely, if not entirely, rests upon the assumption that the pri-

mary obligation the enforcement of which was stayed by the bond under consideration was of a preferential character, and I entertain no doubt that if the primary obligation is of such character a surety who pays the same may claim preference under the principle of subrogation. Judge Hanfords' view was that a claim for personal injury arising out of the operation of a railroad was of a preferential character, and while I have very strong sympathy with that view, the established rule in this jurisdiction is to the contrary. In *Farmers Loan & Trust Co. v. Watts*, intervenor, 74 Fed. 431, there is an expression of dissent by Judge Gilbert, from Judge Hanford's reasoning, followed with the suggestion that his conclusion could be sustained upon other grounds. The question here under consideration was not before Judge Gilbert, and the remark referred to was made merely for the purpose of distinguishing Judge Hanford's decision. While an extract quoted in petitioner's brief from *Gay v. Hudson River Co.*, 182 Fed. 904, tends in a general way to support its view, the preference sought in that case was denied and the substantial reasoning of the opinion militates strongly against the petitioner. The reasoning is so pertinent to the facts here that I quote somewhat at length. "When the bond was executed and delivered, the Hudson River Electric Power Company, so far as appears, was doing business in the usual way and was apparently solvent. No execution had been issued, and no property had been levied upon, and the corporation was not in default in the payment of its

interest or current expenses so far as appears. The mortgage bondholders had no right to possess themselves of the mortgaged property or to interfere with the operations of the corporation at that time. It is probably true that an execution would have been issued and a levy made if the judgment had not been paid or the bond given, but, as already stated, it is not charged that the corporation did not at the time have money properly applicable thereto with which to pay the judgment, which was for damages for negligence, and not an ordinary operating expense. Of course, the negligence was in operating the business and gave rise to the cause of action, and in such sense was an operating liability. But still there is no allegation that current earnings which should or which might have been used to pay this liability were diverted to the purchase of property which has gone under the lien of the mortgage, or to the permanent improvement of such property, or in reduction of the bonded debt. Suppose the claim sued upon had been for property purchased and used in the business of the corporation generally, for repairs, changes, and operation, and defense had been made, judgment rendered against the corporation, and a bond given to stay execution on appeal, and the judgment affirmed and payment made by the sureties. Would the sureties be entitled to a preference over the mortgage bondholders? I think not. There would be no more equity in such case than in most cases where litigation is had, judgment obtained, and bonds given to stay execution, which judgments the sureties are

compelled to pay if the principal does not." Of like import is the case of *Pennsylvania Steel Co. vs. New York City R. R. Co., etc.*, 165 Fed. 485. I quote from the syllabus: "The surety on a supersedeas bond given by a street railroad company on appeals from judgments against it which has been compelled to pay such judgments, on their affirmance, after the insolvency of the Company, is not entitled to rank as a preferred creditor in the insolvency proceedings against the company with creditors having claims for supplies furnished to keep the road in operation." No other cases have been called to my attention. It would be an extremely dangerous doctrine and would render the securities of public service corporations most precarious if the mortgagor could, by permitting suit to be brought and judgment obtained against it, and then taking an appeal and furnishing a supersedeas bond, give priority over the bonds to an indebtedness which otherwise has no substantial features of a preferential claim.

Are the circumstances such as to make the claim exceptional and to warrant its payment in preference to other claims? The petitioner lays great stress upon the contention that the bond was given to protect and preserve the property of the company and to enable it to continue as a going concern. But, as pointed out by Judge Ray in the Gay case, the company here was apparently solvent at the time the judgment was entered, and could, if it saw fit so to do, have paid the claim. The assistance of the petitioner was therefore not necessary to enable it to pre-

serve the unity of its property or to continue as a going concern or to perform its obligations to the public. Apparently it was doing business in the usual way and was solvent. No execution had been issued, and no property had been levied on, and it was not in default in the payment of its interest or current expenses. It is altogether probable that an execution would have been issued and a levy made had the company failed to pay the judgment or give a supersedeas bond, but that fact establishes no strong equities in favor of the petitioner. In the agreement it was stated, and not denied, that the petitioner was in the business of furnishing bonds for a consideration, and therefore it is to be assumed that it was paid the ordinary charge for such a bond. Suppose that instead of taking an appeal and furnishing a supersedeas bond the judgment debtor had applied to a bank for a loan, and with the money thus secured had satisfied the judgment, the substantial equities in favor of the bank would, to say the least, be quite as strong as those in favor of the petitioner here, but in no view of the law could it for such reason alone be recognized as a preferred creditor.

In another aspect of the case, however, the petitioner's claim is quite distinctive. As already suggested, the electric line by which the fire was caused was constructed by the Shoshone Light & Water Company. It appears that the line passed diagonally across block 40 in the village of Shoshone, and across Newman's property, and that instead of erecting suitable poles, the company, in violation of Newman's

rights and without his knowledge or permission, attached the wires to his corrugated iron barn, and in such a manner that as they swayed back and forth they came into contact with the iron, and as a result combustible material in the barn was ignited. As further suggested, at the time of the fire the judgment debtor had possession of the system by permission of the Shoshone Light & Water Company under a contract to purchase. By the terms of that contract it paid a certain amount in cash and the balance was to be paid from month to month out of the income arising from the operation of the system. Among other things it is stipulated "that the property of said Shoshone Light & Water Company was acquired by the Great Shoshone & Twin Falls Water Power Company out of the income from said property, payments being made each month, an amount in excess of the claim of the petitioner having been paid in this way prior to the execution of said bond, and a large amount in excess of petitioner's claim having been paid subsequent to the execution of said bond and before the appointment of a Receiver herein, and that since the receivership herein the Receiver has paid out of the income of said property on account of the purchase price therefor a sum in excess of $7,000.00." Now it is clear, I think, that under the averments of Newman's complaint he had a right of action against the Shoshone Light & Water Company as well as against the Great Shoshone & Twin Falls Water Power Company. He charged both the negligent construction and the negligent operation of

the system, and for the negligent construction the Shoshone Light & Water Company alone was responsible. Whether under a more or less generally recognized principle whereby the lessor of a public utility is held responsible to the public for the negligent operation thereof by its lessee, the Shoshone Light & Water Company is legally chargeable with the negligence of the Great Shoshone Company in operating the system, it is unnecessary to inquire. Certain it is that there is a very close connection between the two companies in their relation to the accident, for substantially the only negligence charged against the Great Shoshone Company is the continued maintenance and operation of the line in the improper condition in which it was constructed. Section 2796 of the Revised Codes of Idaho, as amended in 1909 (Session Laws 1909, p. 163), purports to confer upon corporations the power "to purchase and hold such real and personal estate as the purpose of the corporation may require, not exceeding the amount limited by this title; and to sell, lease, assign, transfer, mortgage, or convey any rights, privileges, franchises, real or personal property of the corporation, other than its franchises of being a corporation; and to purchase, own, vote, sell or hypothecate the stock and bonds of other corporations." But this provision must be read in the light of the limitations contained in Section 15 of Article XI of the Constitution of the State, which declares that "the legislature shall not pass any law permitting the leasing or alienation of any franchise so as to release or relieve the franchise or property

held thereunder from any of the liabilities of the lessor or grantor, or lessee or grantee, contracted or incurred in the operation or use or enjoyment of the franchise or any of its privileges." Now it is by virtue only of the "after-acquired property" clause of the trust deed which has been foreclosed that the trustee and the bondholders acquired any lien upon the system thus purchased from the Shoshone Light & Water Company, and it is elementary that under such a mortgage provision the lien of the mortgage attaches subject to all valid claims against the property at the time the title thereto passes to the mortgagor. If, as he had a right to do, Newman had sued the Shoshone Light & Water Company alone, or had joined it with the Great Shoshone Company as co-defendant, and had secured judgment against it, manifestly it could not, by transferring its property, have put it beyond his reach; he could have pursued it and insisted upon its application to the payment of his judgment. Insofar as the Great Shoshone Company is concerned doubtless the claim must be regarded as in every real sense an expense incident to the operation of the system. Certainly in determining the net result of operation and in computing the net income, expense of this character must be deducted from the gross income. But here we find that instead of applying the income to the payment of this claim a large part thereof has been devoted to the purchase price of the property, and now the property thus acquired and paid for has been sold for the purpose of discharging the bonds. As against New-

man, and, for that reason alone, as against the petitioner here also, it would seem to be highly inequitable that the bondholders should thus receive the proceeds of the property without first paying an obligation incurred by the mortgagor in operating it for the purpose of procuring the very funds by which it was to be acquired and made available to the bondholders. In view of these considerations, I think that even if the Court were not legally bound, it would be strongly constrained by the equities, to recognize this claim as being superior to that of the bondholders, insofar as the proceeds of the sale of this property is concerned. But, however that may be, the execution and the placing in escrow of the deed by the Light & Water Company after it had negligently constructed the lien, and the delivery of such deed to the Great Shoshone Company after the accident, could not, in the face of the constitutional provision above quoted, operate to defeat Newman's right to pursue the property conveyed and require that it first be devoted to the satisfaction of his claim. *Seymour v. Boise R. Co.*, 24 Idaho, 7; 132 Pac. 427.

In giving the concrete relief warranted by this view some difficulty is encountered by reason of the fact that the property thus acquired was sold, together with all other properties belonging to the judgment debtor, as a unit, and hence there is no way of ascertaining the amount which it brought. However, a part of the property purchased from the Shoshone Light & Water Company was the village water system, and this was later resold to the village by the Great Shoshone Company, the sale having been fully

consummated since the appointment of the Receiver. The Receiver has now been paid in full by the village on account of the purchase price, and he now holds an amount greatly in excess of the claim. I see no reason why it should not be paid out of this fund.

Counsel for the petitioner may prepare an order directing the Receiver to pay the full amount of the Newman judgment out of the funds in his hands received from the village of Shoshone.

And thereafter, on May 3rd, 1916, the said Court made and entered herein its order granting said petition of said Boise Title and Trust Company.

ORDER SETTLING STATEMENT.

The within and foregoing is settled and allowed this 18th day of November, 1916, as the statement on the appeal of American Water Works and Electric Company and William T. Wallace as Receiver of Great Shoshone and Twin Falls Company taken from that certain order made and entered herein on the 3rd day of May, 1916, and the same contains all of the papers and records considered by the Court in granting the petition of the said Boise Title and Trust Company for preference and indemnity, except the complaint, order appointing the Receiver, the claim of American Water Works and Electric Company and the order allowing the same.

FRANK S. DIETRICH,
District Judge.

Dated November 18, 1916.

Endorsed: Filed November 20, 1916.

W. D. McReynolds, Clerk.

(Title of Court and Cause.)

Equity No. 509.

ORDER FOR PAYMENT OF PREFERRED CLAIM TO THE BOISE TITLE & TRUST CO. In Re. NEWMAN CASE.

The petition of the Boise Title & Trust Company for an allowance of a preferred claim for and on account of the said Trust Company having given an appeal bond and a bond for stay of execution in the case of J. W. Newman v. The Great Shoshone & Twin Falls Water Power Company, having come on for hearing;

And it appearing to the Court that said petition should be allowed, therefore, in accordance with the decision rendered herein;

It Is Hereby Ordered, that the Receiver of the Great Shoshone & Twin Falls Water Power Company pay to said J. W. Newman or his attorney of record from the funds now in his hands received from the sale of the Village Water System in the town of Shoshone, such sum as may be required to fully indemnify the said Boise Title & Trust Company on account of its liability on said bond in the above entitled case, the amount being $1,228.55, together with interest at rate of seven per cent from the 24th day of April, 1914, and the sum of $30.25 costs as directed by the Supreme Court of the State of Idaho in its remittitur in said cause.

FRANK S. DIETRICH, Judge.

Dated May 3rd, 1916.

Filed May 3rd, 1916.

W. D. McReynolds, Clerk.

By Pearl E. Zanger, Deputy.

In the District Court of the United States for the District of Idaho, Southern Division.

GUY I. TOWLE, Plaintiff,

vs.

GREAT SHOSHONE AND TWIN FALLS WATER POWER COMPANY, a corporation, Defendant.

In Equity No. 509.

PETITION OF AMERICAN WATER WORKS AND ELECTRIC COMPANY, A CORPORATION, AND WILLIAM T. WALLACE, RECEIVER OF GREAT SHOSHONE AND TWIN FALLS WATER POWER COMPANY, FOR APPEAL AND ORDER ALLOWING APPEAL.

Come now American Water Works and Electric Company, a corporation, and William T. Wallace, Receiver of Great Shoshone and Twin Falls Water Power Company, and, considering themselves aggrieved by the order made and entered herein on the 3rd day of May, 1916, granting the application and petition of Boise Title and Trust Company for the allowance of its claim as a preferred claim and for indemnity and directing said Receiver of the Great Shoshone and Twin Falls Water Power Company to pay to J. W. Newman or his attorneys of record from the funds in the hands of the said Receiver received from the sale of the village water system in the town of Shoshone such sum as might be required fully to indemnify the said Boise Title and Trust Company on account of its liability upon the appeal bond re-

ferred to in said order, hereby appeal from the said order so made and entered as aforesaid to the United States Circuit Court of Appeals for the Ninth Circuit for the reasons specified in the assignment of errors which is filed herewith; and your petitioners pray that this appeal may be allowed, and that citation issue as provided by law and that a copy of the record proceedings and papers upon which said order was based, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit.

WYMAN & WYMAN,
Solicitors for American Water Works and Electric Company and William T. Wallace, Receiver of Great Shoshone and Twin Falls Water Power Company.

October 25, 1916.

FRANK T. WYMAN, of Counsel.

ORDER ALLOWING APPEAL.

AND NOW, to-wit, on the 30th day of October, 1916, it is Ordered that the above and foregoing petition be granted and the appeal be allowed as prayed for. The appeal bond shall be in the sum of $500.00.

FRANK S. DIETRICH,
District Judge.

Endorsed: Filed Oct. 30, 1916.
W. D. McReynolds, Clerk.

In the District Court of the United States for the District of Idaho, Southern Division.

GUY I. TOWLE, Plaintiff,

vs.

GREAT SHOSHONE AND TWIN FALLS WATER POWER COMPANY, a corporation, Defendant.

In Equity No. 509.

ASSIGNMENT OF ERRORS.

And now come American Water Works and Electric Company, a corporation, and William T. Wallace, Receiver of the Great Shoshone and Twin Falls Water Power Company, and having presented an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the Order made and entered in the above entitled cause on the 3rd day of May, 1916, granting the petition of Boise Title and Trust Company for indemnity and directing the said William T. Wallace as Receiver of said Great Shoshone and Twin Falls Water Power Company to pay to J. W. Newman, or his attorneys of record, a sum specified in said order, and say that the said order and decision made and entered as aforesaid, are erroneous and unjust to these appellants and particularly in this:

1st. Because the Court erred in holding, ordering, adjudging and decreeing in its said order that the said claim of the Boise Title and Trust Company is a preferred claim or is entitled to preference over the claims of other general creditors and particularly over the claim of the appellant American Water Works and Electric Company.

2nd. Because the Court erred in holding, ordering, adjudging or decreeing in its said order that the Receiver of said Great Shoshone and Twin Falls Water Power Company pay to said Newman or to his attorneys out of funds in his hands received from the sale of the Village Water System in the Town of Shoshone such sum as should be required to indemnify the said Boise Title and Trust Company on account of the said liability referred to in said order, or to pay any sum whatsoever out of said or any fund or at all.

3rd. Because the Court erred in holding, ordering, adjudging and decreeing on said order that the said Boise Title and Trust Company is entitled to any relief upon its said petition or at all.

Wherefore, the said American Water Works and Electric Company and William T. Wallace, Receiver of the Great Shoshone and Twin Falls Company, pray that the order so made and entered as aforesaid on the 3rd day of May, 1916, be annulled and set aside and the petition of the said Boise Title and Trust Company be denied and that it be refused all relief herein.

WYMAN & WYMAN,
Solicitors for American Water Works and Electric Company, and for William T. Wallace, as Receiver Great Shoshone and Twin Falls Water Power Company.

October 25th, 1916.

FRANK T. WYMAN, of Counsel.

Endorsed: Filed Oct. 30, 1916.
W. D. McReynolds, Clerk.

(Title of Court and Cause.)

In Equity No. 509.

KNOW ALL MEN BY THESE PRESENTS, That we, American Water Works and Electric Company, a corporation organized under the laws of the State of Virginia, and W. T. Wallace as Receiver of the Great Shoshone and Twin Falls Water Power Company, as principals, and National Surety Company, a corporation organized under the laws of the State of New York, as surety, are held and firmly bound unto Boise Title and Trust Company, petitioner and claimant herein, and to Guy I. Towle, plaintiff herein, Great Shoshone and Twin Falls Water Power Company, a corporation, defendants, Lynch-Cannon Engineering Company, a corporation, Equitable Trust Company of New York, a corporation, Inter-Mountain Electric Company, a corporation, The Thousand Springs Power Company, a corporation, Electric Investment Company, a corporation, L. M. Plumer and E. B. Scull, Executors of the estate of L. L. McClelland, deceased, Intervenors and petitioners; as their respective interests may appear herein in the penal sum of Five Hundred Dollars, to be paid to plaintiff, defendant, intervenors and petitioners as their respective interests may appear, as aforesaid, their and each of their executors, administrators, successors, or assigns; to which payment well and truly to be made we bind ourselves, our heirs, executors, administrators and assigns, jointly and severally by these presents.

Sealed with our seals and dated this 25th day

of October, A. D. one thousand nine hundred and sixteen.

The conditions of this obligation are such that:

Whereas, the above-named American Water Works and Electric Company and William T. Wallace, Receiver of the Great Shoshone and Twin Falls Water Power Company, has prosecuted an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from an order made and entered in said cause on the 3rd day of May, 1916, by the United States District Court for the District of Idaho, Southern Division, granting the petition of the said Boise Title and Trust Company for preference and indemnity,

Now, Therefore, if the above-named principals, American Water Works and Electric Company, and William T. Wallace, Receiver of the Great Shoshone and Twin Falls Water Power Company, shall prosecute their said appeal to effect and, if they shall fail to make their said appeal good, shall answer all costs, then the above obligation to be void, otherwise the same shall be and remain in full force and virtue.

IN WITNESS WHEREOF, the said principals have caused their respective names to be hereunto subscribed by their duly authorized solicitors and said surety has caused its name to be hereunto subscribed by its duly authorized officers and its corporate seal affixed the day and year first above written.

AMERICAN WATER WORKS AND
ELECTRIC COMPANY,
By WYMAN & WYMAN,
Its Solicitors.

WILLIAM T. WALLACE,
Receiver Great Shoshone and Twin Falls Water Power Company,
By WYMAN & WYMAN.
NATIONAL SURETY COMPANY,
By L. W. ENSIGN,
(Corporate Seal) Its Attorney in Fact.

The above and foregoing bond is hereby approved.

FRANK S. DIETRICH,
District Judge.

Endorsed: Filed Oct. 30, 1916.
W. D. McReynolds, Clerk.

(Title of Court and Cause.)
In Equity No. 509.

PRAECIPE ON APPEAL OF AMERICAN WATER WORKS AND ELECTRIC COMPANY AND WILLIAM T. WALLACE, RECEIVER OF GREAT SHOSHONE AND TWIN FALLS WATER POWER COMPANY.

To the Clerk of the Above Entitled Court:

You will please prepare the record on the appeal of the American Water Works and Electric Company and William T. Wallace, Receiver of the Great Shoshone and Twin Falls Water Power Company, taken in the above entitled cause from the order made and entered herein on May 3, 1916, granting the petition of the Boise Title and Trust Company for preference and indemnity.

Said record is to consist of the following:

1. Complaint of Guy I. Towle.
2. Order appointing Receiver.

3. Claim of American Water Works and Electric Company.
4. Order allowing claim of American Water Works and Electric Company.
5. Statement of Appellants herein.
6. Order of May 3, 1916.
7. All papers in connection with the appeal:
   Petition of American Water Works and Electric Company, and William T. Wallace, Receiver of Great Shoshone and Twin Falls Water Power Company, on appeal;
   Order allowing appeal of these appellants;
   Assignment of Errors of these appellants;
   Citation of these appellants on the appeal;
   Bond of these appellants on this appeal.
8. In the event any of the papers included in appellant's proposed statement as filed herein be excluded upon the settlement thereof, then such excluded papers shall be printed as part of record.

In preparing the above record you will please omit the title to all pleadings, except the first, but in lieu thereof insert the words "Title of Court and Cause," to be followed by the name of the pleading or instrument. You will also please omit the verification to all pleadings, but in lieu thereof, whenever the pleading is verified, use the words "duly verified."

WYMAN & WYMAN,
Solicitors for American Water Works and Electric Company and William T. Wallace as Receiver of Great Shoshone & Twin Falls Water Power Company.

We waive our right to file praecipes and join in the above praecipes.

S. H. HAYS,
Solicitor for Boise Title and Trust Company.

KARL PAINE,
Solicitors for Guy I. Towle, Complainant.

S. H. HAYS, and
P. B. CARTER,
Solicitors for Great Shoshone and Twin Falls Water Power Company, Defendant.

MARTIN & CAMERON,
Solicitors for L. M. Plumer and E. B. Scull, Executors of the estate of L. L. McClelland, deceased, Intervenors.

EDWIN SNOW,
Solicitor for Lynch-Cannon Engineering Company, Intervenors.

SULLIVAN & SULLIVAN,
Solicitors for Equitable Trust Company of New York.

PARSONS & PARSONS,
Solicitors for Inter-mountain Electric Company and The Thousand Springs Power Company, Intervenors.

RICHARDS & HAGA,
Solicitors for Electric Investment Company, Intervenor.

Endorsed: Filed Dec. 16th, 1916.
W. D. McReynolds, Clerk.

(Title of Court and Cause.)
In Equity No. 509.
CITATION.

United States of America,—ss.

To the President of the United States of America:

To Guy I. Towle, plaintiff, Great Shoshone and Twin Falls Water Power Company, a corporation, defendant, and Boise Title and Trust Company, Lynch-Cannon Engineering Company, a corporation, Equitable Trust Company of New York, a corporation, Inter-Mountain Electric Company, a corporation, The Thousand Springs Power Company, a corporation, Electric Investment Company, a corporation, L. M. Plumer and E. B. Scull, Executors of the estate of L. L. McClelland, deceased, Intervenors and Petitioners:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit, to be held in the City of San Francisco, State of California, within thirty days from the date of this writ, pursuant to an appeal filed in the Clerk's office of the District Court of the United States for the District of Idaho, Southern Division, by American Water Works and Electric Company and William T. Wallace, Receiver of the Great Shoshone and Twin Falls Water Power Company, in a suit wherein the Guy I. Towle is complainant, and Great Shoshone and Twin Falls Water Power Company, a corporation, is defendant, and Boise Title and Trust Company, Lynch-Cannon Engineering Company, a corporation, Equitable Trust Company

of New York, a corporation, Inter-Mountain Electric Company, a corporation, The Thousand Springs Power Company, a corporation, Electric Investment Company, a corporation, L. M. Plumer and E. B. Scull, Executors of the estate of L. L. McClelland, deceased, interveners and petitioners, to show cause, if any there be, why the order in said appeal mentioned should not be corrected and speedy justice should not be done for the parties in that behalf.

WITNESSETH, the Hon. Frank S. Dietrich, United States District Judge for the District of Idaho, this 30th day of October, 1916, and the independence of the United States the one hundredth and forty-first year. FRANK S. DIETRICH,

Attest: District Judge.

W. D. McREYNOLDS, Clerk.

Service of the above and foregoing citation and receipt of copy thereof admitted this 31st day of October, 1916.

S. H. HAYS,
Solicitor for Boise Title and Trust Company.

KARL PAINE,
Solicitor for Guy I. Towle, Complainant.

P. B. CARTER,
Solicitor for Great Shoshone and Twin Falls Water Power Company, defendant.

MARTIN & CAMERON,
Solicitors for L. M. Plumer and E. B. Scull, Executors of the estate of L. L. McClelland, deceased, Interveners.

THURMAN, WEDGWOOD & IRVIN,
Solicitors for Lynch-Cannon Engineering Company, Interveners.
SULLIVAN & SULLIVAN,
Solicitors for Equitable Trust Company of New York.
PARSONS & PARSONS,
Solicitors for Inter-Mountain Electric Company and The Thousand Springs Power Company, Interveners.
RICHARDS & HAGA,
Solicitors for Electric Investment Company, Intervener.

Endorsed: Filed Nov. 14, 1916.
W. D. McReynolds, Clerk.
By Pearl E. Zanger, Deputy.

RETURN TO RECORD.

And thereupon it is ordered by the Court that the foregoing transcript of the record and proceedings in the cause aforesaid, together with all things thereunto relating, be transmitted to the United States Circuit Court of Appeals for the Ninth Circuit, and the same is transmitted accordingly.

Attest: W. D. McREYNOLDS,
(Seal) Clerk.

(Title of Court and Cause.)

CLERK'S CERTIFICATE.

I, W. D. McReynolds, Clerk of the District Court of the United States for the District of Idaho, do hereby certify that the foregoing transcript of pages numbered from 1 to 87, inclusive, contain true and correct copies of Complaint of Guy I. Towle, Order Appointing Receiver, Claim of American Water Works and Electric Company, Order allowing claim of American Water Works and Electric Company, Statement of Appellants herein, Order of May 3, 1916, Petition of American Water Works and Electric Company and William T. Wallace, Receiver of Great Shoshone and Twin Falls Water Power Company for Appeal, Order allowing appeal of these Appellants, Assignment of Errors of these Appellants, Bond of these Appellants on appeal, Praecipe, Citation, Return to Record and Clerk's Certificate, in the cause aforesaid, which together constitute the transcript of record herein upon appeal to the United States Circuit Court of Appeals for the Ninth Judicial Circuit. I further certify that the costs of the record herein amounts to the sum of $103.55, and that the same has been paid by appellants.

Witness my hand and the seal of said Court this 21st day of December, 1916.

W. D. McREYNOLDS,

(Seal) Clerk.

2902

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

AMERICAN WATER WORKS AND ELECTRIC COMPANY, a corporation, and WILLIAM T. WALLACE, Receiver of Great Shoshone & Twin Falls Water Power Company, a corporation,

Appellants,

vs.

GUY I. TOWLE, plaintiff, GREAT SHOSHONE & TWIN FALLS WATER POWER COMPANY, a corporation, defendant, and BOISE TITLE AND TRUST COMPANY, a corporation, LYNCH-CANNON ENGINEERING COMPANY, a corporation, EQUITABLE TRUST COMPANY OF NEW YORK, a corporation, INTER-MOUNTAIN ELECTRIC COMPANY, a corporation, THE THOUSAND SPRINGS POWER COMPANY, a corporation, ELECTRIC INVESTMENT COMPANY, a corporation, L. M. PLUMMER and E. B. SCULL, Executors of the Estate of L. L. McCLELLAND, deceased, intervenors and petitioners,

Appellees.

BRIEF FOR APPELLANTS.

This is an appeal by the American Water Works and Electric Company as a creditor, and William T.

Wallace as Receiver of the Great Shoshone & Twin Falls Water Power Company, hereinafter called the Great Shoshone Power Company, from an order of the District Court filed May 3, 1916, directing the Receiver to pay a judgment for $1,228.55, recovered by J. W. Newman against the Great Shoshone Power Company, out of the proceeds of the sale of the village water system in the town of Shoshone (pp. 74–6). This order was made in pursuance of a petition presented by the Boise Title and Trust Company, which had given a bond to secure the judgment pending an appeal, and prayed that the Receiver be required to pay the judgment in order to relieve it from its obligation on the bond (pp. 35–42).

The substantial question presented is whether the judgment recovered by Newman was entitled to a preference in the distribution of the proceeds of the sale of the Shoshone water system, over and above the mortgage bondholders and other creditors of the Great Shoshone Power Company. The decision of the District Court to the effect that the judgment was entitled to such preference is based upon Section 15 of Article XI of the Constitution of the State of Idaho which provides:

> "The legislature shall not pass any law permitting the leasing or alienation of any franchise so as to release or relieve the franchise or property held hereunder from any of the liabilities of the lessor or grantor, or lessee or grantee, contracted or incurred in the operation or use or enjoyment of the franchise or any of its privileges."

The principal contentions of the appellants relate to the meaning and effect of this section of the Constitution and its applicability to the present controversy. The main facts appear from a stipulation made for the purpose of this petition of the Boise Title and Trust Company (pp. 52-61).

Prior to July 1, 1912, the great Shoshone Power Company, a corporation of the State of Delaware, owned and was operating two electric power plants, together with upwards of two hundred miles of transmission lines in the State of Idaho. The Shoshone Light and Water Company, a corporation of the State of Idaho, owned and was operating a power plant and transmission lines and also a water works plant in the town of Shoshone, in the State of Idaho (p. 53). On July 1, 1912, it entered into a contract with the Great Shoshone Power Company, by which it transferred and turned over to the Great Shoshone Power Company all power plants, transmission lines, fixtures, pumping plant, water mains, real estate and other property, shown by a certain inventory and abstract of title, in consideration of the sum of $55,000, of which $15,000 was paid in cash and the balance was to be paid out of the gross earnings of the plants, the contract providing that the Great Shoshone Power Company should pay to the Shoshone Light and Water Company in each month sixty per cent. of the gross earnings of the said plants until the balance of $40,000, with interest, was fully paid (pp. 59–60). On February 12, 1913, the Shoshone Light and Water Company delivered to the First National Bank of Shoshone a deed in favor of the Great Shoshone Power Company, to be held under

an escrow agreement dated February 6, 1913 (pp. 60–61). The Great Shoshone Power Company went into possession of the property of the Shoshone Light and Power Company and continued to operate it until November 2, 1914, when, upon the application of a creditor, the District Court appointed a Receiver of all the property of the Great Shoshone Power Company, upon the ground that it was insolvent and unable to meet its obligations as they matured and became payable (pp. 7–20).

The claim of the American Water Works and Electric Company, as a general creditor of the Great Shoshone Power Company, was duly filed and allowed by the District Court (pp. 20–34).

On the 11th day of April, 1913, a certain barn belonging to J. W. Newman and situated in the town of Shoshone, was destroyed by fire. Newman claimed that the fire was caused by a current of electricity passing through electric wires and coming into contact with his barn or its contents; that the wires had been constructed by the Shoshone Light and Water Company, but were at the time of the fire in possession of and operated by the Great Shoshone Power Company. He brought an action in the State court against the Great Shoshone Power Company alleging negligent construction and negligent maintenance and operation of the wires, recovered a judgment on the 24th day of April, 1914, for $1,079.80 and threatened to issue execution against the property of the Great Shoshone Power Company. The Boise Title & Trust Company thereupon gave a bond to secure the judgment and stay execution pending an

appeal to the Supreme Court of Idaho. This appeal was pending at the time of the appointment of the Receiver. The Supreme Court of Idaho affirmed the judgment in favor of Newman on the 24th day of March, 1916 (pp. 46–7; 54–5).

At the time of the execution of the bond by the Boise Title and Trust Company the Great Shoshone Power Company was acquiring the property covered by the contract of July 1, 1912, and had paid on account of the purchase price and out of the income from said property, an amount in excess of Newman's judgment. After the execution of the bond and before the appointment of the Receiver the Great Shoshone Power Company paid on account of the purchase price and out of the income from the property an amount in excess of Newman's judgment. The Receiver completed the purchase, paying on account of the purchase price and out of the income from said property an amount in excess of $7,000 (p. 56).

On May 1, 1910, the Great Shoshone Power Company made a mortgage to secure an issue of bonds, on June 21, 1911, it made a supplemental mortgage and on April 7, 1913, it made a second mortgage upon its property. At some time after April, 1915, an action to foreclose the first mortgage was brought by the Equitable Trust Company as Trustee (pp. 57–58).

It thus appears that, at the time of the fire and also at the time of the entry of Newman's judgment, the property covered by the contract of July 1, 1912, comprising a lighting system and water system in the town of Shoshone, was in the possession of and being operated by the Great Shoshone Power Company, and a

deed for the conveyance thereof was in escrow, the Great Shoshone Power Company having the right, upon payment of the balance of the purchase price, to acquire the legal title which was still vested in the Shoshone Light and Water Company, that the contract of July 1, 1912, together with the rights of the Great Shoshone Power Company thereunder, was subject to the lien of its mortgages, and that the Receiver, presumably with the authority of the District Court, adopted and carried out the contract of July 1, 1912, acting no doubt for the best interests of the estate.

The order appealed from, directing the Receiver to pay Newman's judgment out of the proceeds of the water system, has the effect of displacing the lien of the mortgages of the Great Shoshone Power Company and giving to Newman a preference over the mortgage bondholders and all other creditors of that Company.

It is apparent from the allegations of the petition that the Boise Title & Trust Company based its claim to a preference, chiefly upon the contention that it had, by giving the bond, protected the property of the Great Shoshone Power Company from levy and sale under execution and had permitted the Company to use for the maintenance and operation of its systems, funds and supplies which would otherwise have been required for the payment of the judgment, and had thus benefited the interests of the mortgage bondholders and the general creditors of the Company and was equitably entitled to have the Receiver pay the judgment and thus relieve it from liability (pp. 41-2).

The District Court rejected the claim in so far as it was based upon mere considerations of equity or benefit

to the estate, and held that, independently of Section 15 of Article XI of the Constitution of Idaho, the Boise Title & Trust Company was not entitled to any preference, citing authorities which seem to be conclusive on this point (pp. 60–68). The court then proceeded to consider Section 15 of Article XI of the Constitution and held that the Shoshone Light and Water Company was liable to Newman for negligence in the construction of the wires which caused the fire, that such liability existed before the contract of July 1, 1912, and that the Shoshone Light and Water Company could not by transferring or agreeing to transfer its property to the Great Shoshone Power Company, defeat Newman's right to pursue the property and require that it be devoted to the satisfaction of his claim. The court further held that, as the property acquired from the Shoshone Light and Water Company became subject to the mortgages of the Great Shoshone Power Company by virtue of after-acquired property clauses, and necessarily in the condition respecting liens and claims which existed at the time of its acquisition by the Great Shoshone Power Company, the claim of Newman was superior to that of the mortgage bondholders (pp. 69–72).

The District Court recognized one serious practical difficulty arising from the fact that all the property of the Great Shoshone Power Company was sold as a unit under a foreclosure decree and that there was no way of ascertaining separately the amount realized for the property acquired from the Shoshone Light and Water Company. He met this difficulty by saying that a part of the property in question, to wit: the water system, was later sold separately to the

Town of Shoshone at a price which was greater than the amount of Newman's judgment, and directing that the judgment be paid out of the proceeds of this sale, which had come into the hands of the Receiver (pp. 72–3). The record does not furnish any evidence or explanation of this transaction, but it is possible that the purchaser at the foreclosure sale consented, in consideration of some reduction in price, that the Receiver might sell the water system to the Town of Shoshone and retain the proceeds. It was fully recognized that the lighting system and the water system, acquired from the Shoshone Light and Water Company, and necessarily the proceeds thereof, were subject to the lien of the mortgages of the Great Shoshone Power Company.

The appellants submit that the District Court has made certain assumptions of fact which are not justified by the record and that he has misinterpreted and misapplied Section 15 of Article XI of the Constitution of Idaho. They contend that there is no basis for the conclusion that the Shoshone Light & Water Company was liable to Newman for the damage caused by the fire. The question of its liability to Newman was not involved or decided in the action brought by Newman against the Great Shoshone Power Company, and was not raised by the petition of the Boise Title & Trust Company. Nor is there any basis for the inference that any franchise was leased or transferred by the Shoshone Light & Water Company to the Great Shoshone Power Company. The contract, petition and other papers refer only to the sale of physical properties comprising the lighting system

and water system. Even if the Shoshone Light & Water Company were liable to Newman, such liability could not exist until the fire had occurred, and could not have been incurred by that Company in the operation, use or enjoyment of any franchise.

The appellants assign that it was error for the District Court to hold that the claim of the Boise Title and Trust Company was entitled to any preference or priority over other creditors, and error to direct that Newman's judgment be paid out of the proceeds of the water system, and error to grant to the Boise Title and Trust Company any relief whatever (pp. 77–8).

POINT I.

Section 15 of Article XI of the Constitution does not create any lien or any new liability and does not apply unless there is a lease or alienation of a franchise which purports to release or relieve the franchise or property held thereunder from some liability previously contracted or incurred in the operation, use or enjoyment of such franchise.

This section of the Constitution is in form merely a limitation upon the power of the Legislature. It probably has the effect of limiting the authority *to lease or transfer franchises*, conferred upon corporations by Section 2796 of the Revised Code of Idaho, to the extent of requiring that the *leasing* or *alienation* of a franchise should not *release* or *relieve* the franchise or

property held thereunder from liabilities, which had already been contracted or incurred in the operation, use or enjoyment of the franchise. It does not, however, say anything about liens or preferences, and does not purport to give to the liabilities mentioned any lien upon the franchise or property held thereunder or any preference or priority over other claims enforceable against the franchise or property. Much less does it purport to create any new kind of liability.

The section has no effect unless there is a lease or alienation of a franchise which purports to *release* or *relieve* the franchise or property held thereunder from some liability which would otherwise be enforceable against such franchise and property. It does not give to the holder of any liability any form of security or any preference or priority over other creditors which he would not have if the lease or alienation were not made. The section does not say that his position is to be improved or strengthened by the lease or alienation, but merely that it shall not be prejudiced or weakened thereby. The question whether the liability exists and against what property it is enforceable must depend upon the situation existing before the lease or alienation of the franchise and upon the law independently of Section 15.

Seymour v. *Boise Railroad Co.*, 24 Idaho, 7.

Lee v. *Southern Pacific R. R. Co.*, 116 Cal., 97.

Murray v. *Chesapeake & Ohio Ry. Co.*, 115 S. W. 82.

Russell's Administrators v. *Frankfort Ry. Co.*, 116 S. W. 289.

Wyeth Hardware Co. v. *Jas. Spencer Bateman Co.*, 47 Pac. 604.

Cooper v. *Utah Light & Ry. Co.*, 102 Pac. 202.

Central Trust Co. v. *Warren*, 121 Fed. Repr. 323 (C. C. A., 9th Circuit).

Sundles v. *Idaho-Oregon Light & Power Co.*, 218 Fed. Rep. 698 (D. C. Idaho).

In *Seymour* v. *Boise R. R. Co.*, *supra*, the Supreme Court of Idaho said:

> "It will be noticed that the Constitution does not forbid a transfer of the franchise and property of a corporation, but simply declares that no sale or transfer shall release the franchise and property held thereunder from any liability incurred by the grantor or lessor or grantee or lessee in the operation, use, or enjoyment of such franchise. Section 15, art. 11, Const.; *City of South Pasadena* v. *Pasadena L. & W. Co.*, 152 Cal. 579, 93 Pac. 490. It was the intention of the framers of the Constitution to make these *pre-existing* 'liabilities' preferred claims against the franchise and property transferred, and to declare them prior and superior to any *subsequent* bonds, mortgages, or incumbrances placed thereon by the purchaser or transferee of such franchise and property".

Although the liabilities in question are referred to as preferred claims, it is evident that the Court did not intend to hold that these liabilities had any preference or priority over other unsecured claims. No question of preference or priority was presented, the only point

in controversy being whether the liabilities of a grantor could be enforced against the franchise and the property held thereunder in the hands of the grantee.

In *Central Trust Company* v. *Warren*, *supra*, the Circuit Court of Appeals of the Ninth Circuit held, that a section of the Constitution of Montana, similar to Section 15, Article XI, of the Constitution of Idaho, did not give to a claim for personal injuries priority over a mortgage previously made. The Court said:

> "It is further contended by the appellee that the priority of his judgment is secured to him under section 17 of article 15 of the Constitution of Montana. That section provides as follows;
>
> 'Sec. 17. The legislative assembly shall not pass any law permitting the leasing or alienation of any franchise so as to release or relieve the franchise or property held thereunder from any of the liabilities of the lessor or grantor or lessee or grantee contracted or incurred in the operation, use or enjoyment of such franchise, or any of its privileges.'"
>
> In what respect this prohibition upon the power of the legislative assembly has been violated by legislative act is not pointed out, and our attention has not been called to any statute enacted by the legislative assembly which this provision of the Constitution forbids. But, assuming that the prohibition applies directly, without legislation, to the leasing or alienation of a franchise contrary to the terms of the prohibition, the question arises, what act in this case is claimed to be prohibited by the Constitution? It must be, if anything, the act of releas-

ing or relieving the franchise and the property held thereunder from a liability of the grantor incurred in the operation, use, and enjoyment of the franchise. But in what respect did the execution of the mortgage or trust deed in this case release or relieve the grantor from such liability? The giving of a mortgage does not relieve or release the grantor or the property held thereunder from any liability; it merely provides a security for the debt for which the mortgage is given, and whatever other liability there may be remains as before. If the value of the franchise or property held thereunder is sufficient, all liabilities, including the mortgage debt, will be paid in their order, and paid in full. Whether any debt or liability will be paid depends upon the solvency of the corporation and the value of its property, and not upon the terms of the conveyance to the mortgagee. There is no relieving or releasing the franchises or the property held thereunder from any liability unless the mortgagor is insolvent, or unless the mortgage is given in anticipation of insolvency. But no such condition of the mortgagor at the time the mortgage was executed is alleged or claimed in this case. The mortgage was given for a valuable consideration and in due course of business, and it is not alleged that it was given for the purpose of hindering or delaying other creditors. It is true it is alleged in the bill of complaint that the mortgagor is insolvent, but this allegation has reference to the date when the bill was filed, on October 15, 1901, and not to the date when the mortgage was given, on January 1, 1895. For all that appears in this record, the mortgagor was solvent when

> the mortgage was given, and was also solvent when the appellee recovered his judgment, on June 4, 1901. There is, therefore, no act alleged tending to show that the mortgage was intended to release or relieve the franchise or the property held thereunder from the liability of the judgment obtained by the appellee, or that the enforcement of the mortgage lien was intended to have that effect. Indeed, it is clear that the right claimed by the appellee to have his judgment declared a prior lien to that of the mortgage is not provided for in the section of the Constitution under consideration. The section does not deal with the priority of liens, but has a different purpose, as has been determined by the Supreme Court of California in *Lee* v. *Southern Pacific R. R. Co.*, 116 Cal. 97, 100, 47 Pac. 932, 38 L. R. A. 71, 58 Am. St. Rep. 140, where a similar provision of the Constitution of the State of California was under consideration."

In *Russell's Administrators* v. *Frankfort Ry. Co.* (*supra*), the Kentucky Supreme Court, in construing a similar provision of the Constitution of Kentucky, said:

> "It was not the purpose of Sec. 203 of the Constitution to make the debts of a corporation a lien upon its assets * * *. It was not the purpose of the Constitutional provision to put the creditor in a better position after the alienation than he was in before the sale was made It was designed only to prevent the sale from prejudicing him."

In so far as Section 15 applies to liabilities of a lessor or grantor, it is clear that it can apply only to

liabilities contracted or incurred *before* the lease or alienation. A liability incurred by a lessor or grantor *after* the lease or alienation of the franchise could not be incurred or contracted in the operation, use or enjoyment thereof. After the lease or alienation of a franchise it is only the lessee or grantee who can operate, use or enjoy the franchise.

It cannot, of course, be claimed that Section 15 was intended to make a lessor or grantor responsible for any liabilities incurred by the lessee or grantee after the lease or alienation. There is nothing in the section to indicate an intention to make a liability enforcible against property or assets of any party other than the one which contracts or incurs the liability. The section does not purport to subject the franchise or property held thereunder to any liabilities which would not otherwise be enforcible against them. It was designed merely to prevent the franchise and property held thereunder from being *released* or *relieved* from liabilities of a certain kind, to which the franchise and property were already subject. It is accordingly clear that the section does not give to the holder of a claim contracted or incurred by a lessee in the operation, use or enjoyment of a franchise any right against the lessor or the interest of the lessor in the franchise and property held thereunder.

The District Court did not hold that the Shoshone Light and Water Company was responsible for the liability incurred to Newman by the Great Shoshone Power Company, and it is clear that it was not responsible for any negligence of the Great Shoshone Power Company in the maintenance or operation of the prop-

erty covered by the contract of July 1, 1912. He referred to "a more or less generally recognized principle whereby the lessor of a public utility is held responsible to the public for the negligent operation thereof by its lessee", but said that it was unnecessary to inquire whether such a principle applied to the present controversy (p. 70). We submit that it is settled by the great weight of authority that the lessor of a public utility or other property is not responsible for personal injury or damage claims based upon the negligence of the lessee in the maintenance or operation of the property.

Hayes v. *Northern Pac. R. Co.*, 74 Fed. Rep. 279 (C. C. A. 7th Cir. 1896);

Arrowsmith v. *Nashville R. Co.*, 57 Fed. Rep. 165 (C. C. Tenn.);

Yeates v. *Ill. Cent. R. Co.*, 137 Fed. Rep. 943 (C. C. Ill. 1905);

Curtis v. *Cleveland, etc., R. Co.*, 140 Fed. Rep. 777 (C. C. Ill. 1905);

Noyes, Intercorporate Relations, 2nd Ed., §§ 218–220.

We further submit that the relation between the Shoshone Light & Water Company and the Great Shoshone Power Company was not that of lessor and lessee. The contract of July 1, 1912, was a contract of sale and not a lease. When a Vendee enters into possession and undertakes the management and operation of property under a contract of sale, pending the full payment of the purchase price and delivery of the deed, the payment of installments of the purchase price is not treated as the payment of rental for the use of

the property and the relation is not that of Lessor and Lessee, unless there is some express agreement to that effect.

Carpenter v. *United States*, 17 Wallace, 489;
Moulten v. *Norton*, 5 Barb. (N. Y.) 286;
Sylvester v. *Ralston*, 31 Barb. (N. Y.) 286;
Moen v. *Lillestal*, 5 North Dakota, 327;
Underhill on Landlord and Tenant, § 223.

In order to sustain the order appealed from it is necessary for the Boise Title and Trust Company to show:

1. That the Shoshone Light and Power Company leased or transferred a franchise to the Great Shoshone Power Company.

2. That the Shoshone Light and Water Company incurred a liability to Newman in the operation, use or enjoyment of such franchise.

3. That such liability was enforceable against such franchise and the "property held thereunder", and that such lease or transfer purported to "release" or "relieve" such franchise from such liability, and

4. That the water system was "held under" such franchise.

POINT II.

There is no evidence of the lease or alienation of any franchise by the Shoshone Light & Water Company.

The District Court does not, in the opinion, consider the question whether the transaction between the Shoshone Light & Power Company and the Great Shoshone Power Company involved the lease or alienation of any franchise. It was apparently assumed that the Shoshone Light & Water Company had municipal franchises from the town of Shoshone to cover the lighting business and water business, and that these franchises were transferred to the Great Shoshone Power Company, together with the physical properties. There is, however, no evidence in the record to substantiate this assumption. The petition of the Boise Title & Trust Company alleges that the property of the Shoshone Light & Water Company consisted of "an electric light plant and a waterworks plant", and makes no mention of any franchise (p. 36). The contract of July 1, 1912, referred only to plants, transmission lines, water mains, fixtures and real estate, and all other property of the Shoshone Light & Water Company which was shown by a certain inventory and a certain abstract of title (pp. 59, 60). Neither the inventory nor the abstract of title are contained in the record, and it is not permissible to infer that any franchise was mentioned on either of them. It is quite reasonable to infer that the Great Shoshone Power Company, which was itself engaged in a public utility business, had all franchises and legal authority necessary for the operation of the lighting system and water system in the town of Shoshone.

POINT III.

There is no evidence that the Shoshone Light & Water Company incurred any liability to Newman in the operation, use or enjoyment of any franchise.

There is no evidence in the record that the wires which caused the fire were constructed by the Shoshone Light & Water Company or that negligence in the construction thereof was the cause of the fire.

The judgment recovered by Newman against the Great Shoshone Power Company established, as against the receiver and all parties to this proceeding, that the fire was caused by the negligence of the Great Shoshone Power Company in the maintenance and operation of the wires, that is, in permitting the wires to remain loose and to sway and strike against the side of the barn and in failing to have them properly insulated, attached and fastened. The complaint filed by Newman contains allegations of negligence in this respect on the part of the Great Shoshone Power Company (p. 46), and it is clear that the liability of that Company could have been adjudicated only on the theory that it had been negligent and that its negligence had caused the damage. There is no theory on which the Great Shoshone Power Company could have been held liable for any negligence in the construction of the wires by the Shoshone Light & Water Company.

The stipulation of facts contains merely the statement that Newman *claimed* that the wires which caused

the accident had been constructed by the Shoshone Light & Water Company. It does not contain any statement to the effect that they were in fact constructed by that Company, much less that there was any negligence in the construction thereof.

The District Court does not refer, in the opinion, to any evidence tending to show that the Shoshone Light and Water Company was liable to Newman for the damage caused by the fire. He refers merely to the "averments of Newman's complaint" and the fact that he "charged both the negligent construction and the negligent operation of the system" (pp. 69–70). It would be extraordinary if in a proceeding of this kind the allegations contained in a complaint filed in another and independent action could be accepted as evidence. A copy of this complaint was attached to the petition of the Boise Title & Trust Company, but there is nothing in the record to show that the parties admitted the allegations of the complaint or even the allegations of the petition. The petition was resisted by the American Water Works and Electric Company and the Receiver, and thereupon the parties entered into a stipulation of facts for the purpose of the hearing on the petition and incorporated in that some but not all of the allegations of the petition (pp. 51–2). It stands to reason that the court is not justified in relying on such allegations as evidence and that the stipulation of facts contains the only evidence in the record with reference to the damage and liability therefor.

From the fact that the damage was caused by negligence in the maintenance or operation of the wires attached to Newman's barn, it cannot reasonably be

inferred that there was negligence in the construction of the wires. It may well be that they were properly attached and insulated when they were first put up and that they did not become loose or sway or strike against the side of the barn until some time thereafter. The probability is that the insulation gradually wore off after the wires became loose and began to sway and strike against the barn, which was made of corrugated iron, and that the fire was due solely to the negligence of the Great Shoshone Power Company in failing to properly inspect the wires and keep them in good and safe condition. The intervening negligence of the Great Shoshone Power Company precludes any causal connection between negligence (if any) in construction and the damage. As a matter of fact, if the wires were not properly constructed and were in a dangerous condition before July 1, 1912, it is hard to understand why the fire did not occur until more than eight months after that date.

Even if it were assumed that the Shoshone Light & Water Company was liable to Newman, it is clear that such liability was not incurred by that Company in the use, operation or enjoyment of any franchise. The liability, if any existed, was not incurred until the date of the damage. Negligent construction of wires does not in and of itself create any liability. It is only when such negligence is followed by damage caused thereby that any right of action can accrue.

2 Cooley on Torts, 3rd Ed., p. 1410.

Murray v. *Chesapeake & Ohio Ry. Co.*, 115 S. W. Repr. 821.

Denver & Rio Grande R. R. Co. v. *Dunn*,
46 Colo. 150.
29 Cyc. 563, and cases cited.

In *Murray* v. *Chesapeake & Ohio Ry. Co.*, *supra*, the Supreme Court of Kentucky held that the date of the damage was the date when the liability was incurred within the meaning of the provision of the Kentucky Constitution similar to Section 15 of Article XI of the Idaho Constitution.

In *Denver & Rio Grande R. R. Co.* v. *Dunn*, *supra*, the Supreme Court of Colorado said:

> "No liability attaches on account of negligence unless damage results from it."

The result is that if Newman had at any time any cause of action against the Shoshone Light & Water Company, it did not accrue until April 13, 1913, more than eight months after the possession of the property was transferred to the Great Shoshone Power Company and the Shoshone Light & Water Company had ceased to use or operate it. If any franchise was covered by the contract of July 1, 1912, it is clear that the Shoshone Light & Water Company was not using, operating or enjoying it at the time of the damage. At all times after July 1, 1912, the Great Shoshone Power Company was using, operating and enjoying all the property covered by that contract. The word "enjoyment" is equivalent to "operation" or "use".

Ward v. *Crane*, 118 Cal. 676;
Baker v. *State*, 17 Fla. 408.

POINT IV.

There is no evidence that any franchise or property has by any lease or alienation been "released" or "relieved" from any liability to Newman.

In so far as Newman acquired any right of action against the Great Shoshone Power Company, it accrued on the 11th day of April, 1913, and was enforceable only against the property and assets of that Company. All the property of that Company was covered by mortgages, including its rights under the contract of July 1, 1912, which had already became subject to the first mortgage of the Great Shoshone Power Company by virtue of the after-acquired property clause, and to its second mortgage, which had been made on the 7th day of April, 1913 (p. 57).

Newman had no lien upon any property and no preference or priority over any of the creditors of the Great Shoshone Power Company until he recovered his judgment. He then acquired a lien, which, however, was subject to all pre-existing liens upon the property of the Great Shoshone Power Company, and of course did not attach to any property of the Shoshone Light and Water Company. The lien of his judgment was suspended when the bond of the Boise Title & Trust Company was given to stay execution pending the appeal (Sec. 4457 of Idaho Revised Codes of 1908). Before the judgment was affirmed all the property of the Great Shoshone Power Company passed into the possession of the Receiver, so that at

the time of the appointment of the Receiver Newman had no lien or security and no preference or priority over other creditors.

It is well settled that in case of the insolvency of a public utility personal injury and damage claims based upon negligence in maintenance or operation are not entitled to a preference over the claims of mortgage bondholders or unsecured creditors.

St. Louis Trust Co. v. *Riley*, 70 Fed. 32 (C. C. A. 8th Cir.).

Penn. Steel Co. v. *N. Y. City Ry. Co.*, 165 Fed. 457 (C. C. A. 2nd Cir.).

Atcheson, etc., R. Co. v. *Osborn*, 148 Fed. 606 (C. C. A. 8th Cir.); aff. 207 U. S. 589.

In so far as Newman acquired any right of action against the Shoshone Light & Water Company, it accrued on the 11th day of April, 1913, and was enforceable only against the property and assets of that Company. The property of that Company affected by the order appealed from was covered by the contract of July 1, 1912, and the escrow agreement of February 6, 1913, and subject to the right of the Great Shoshone Power Company to receive an absolute deed upon payment of the balance of the purchase price. Newman's right was necessarily subordinate to this right of the Great Shoshone Power Company and the rights of its mortgagees.

The Receiver adopted the contract of July 1, 1912, paid the balance of the purchase price and acquired the title to the property of the Shoshone Light & Water Company, presumably under the direction of the Court,

and because it was believed that the contract was a valuable asset, and that completion thereof would enure to the benefit of the general creditors as well as the mortgage bondholders. This acquisition of property, however, was merely the result of the exercise of a right created by the contract of July 1, 1912, before any liability to Newman was incurred. Newman was one of the general creditors for whose benefit the Receiver was appointed, and is presumed to have been acting. If the Receiver had not used funds in his possession for the purpose of making payments under the contract of July 1, 1912, Newman would have had no right to claim that they should be applied to the payment of his judgment. He cannot now complain of the fact that the Receiver adopted and carried out the contract and acquired title to the property pursuant to its provisions.

The property in question has subsequently been sold under a decree foreclosing the mortgages of the Great Shoshone Power Company which existed before the liability to Newman was incurred. Of these sales of course Newman cannot complain. They were merely the result of the enforcement of the rights existing before his claim accrued. It thus appears that since the liability to Newman was incurred there has not been any lease or alienation of any franchise or other property which has prejudiced or in any way affected Newman's right. No franchise or other property, which was in any sense subject to any liability to him, has been released or relieved from any such liability.

It is well settled that involuntary transfers or sales

made pursuant to contracts or mortgages are not within the meaning of Section 15 of Article XI of the Constitution. That section does not affect or impair any right or lien created by contract or mortgage before the liability in question is contracted or incurred.

Russell's Admr. v. *Frankfort Ry. Co.*, 116 S. W. 289;

Roush v. *Vanceburg Turnpike Co.*, 120 Ky. 169;

Central Trust Co. v. *Warren*, 121 Fed. 328;

Sundles v. *Idaho-Oregon Light & Power Co.*, 218 Fed. 698.

Before Newman's claim accrued, there had been, in substance and in equity, an alienation of the property of the Shoshone Light & Water Company. The contract of July 1, 1912, had the effect of transferring to the Great Shoshone Power Company the equitable ownership and also the possession and right to operate. As far as Newman and other creditors were concerned, the situation was the same as if the purchase price had been paid in full and an absolute deed for the property had been delivered. It is well settled that in situations like this, when the deed has been delivered from escrow to the grantee, the title of the grantee is deemed to relate back to the time when the contract of purchase was made and the deed was placed in escrow, except as against purchasers for value without notice. A tort creditor like Newman could not be a purchaser for value, and so it did not make any difference whether he had notice of the contract, but in any case the transfer of possession to the Great Shoshone Power Company was

constructive notice which would put all persons upon inquiry as to the terms of the contract of purchase and the rights of the Great Shoshone Power Company thereunder.

Whitmer v. *Schenk*, 11 Idaho, 702;
Lane v. *Ludlow*, 14 Fed. Cas. 1081; Case No. 8052;
Moyer v. *Hinman*, 13 N. Y. 180;
Fleming v. *Wilson*, 92 Minn. 303;
Carolina Portland Cement Co. v. *Roper*, 67 So. Repr. 115;
Whitfield v. *Harris*, 48 Miss. 710;
Filley v. *Duncan*, 1 Neb. 134;
Black on Judgments, Sec. 438; 23 Cyc. 1373, 1374, 1382.

If it were held that all franchises and property held thereunder were subject to claims accruing after a lease or alienation as the result of negligence of the lessor or grantor occurring before the lease or alienation, a condition of great confusion and hardship would result. Nobody who took a lease, mortgage or other transfer of a franchise and property held thereunder, could ascertain the amount or nature of the claims affecting the franchise and property. There is a sound and just reason for permitting the holder of a claim, which has already accrued, to follow the franchise and property into the hands of a lessee or grantee, and it is entirely possible for a lessee and grantee to ascertain in advance the nature and extent of such claims and make provision for their payment. The leasing and alienation of franchises would, however, be greatly

hampered and restricted if every lessee, purchaser and mortgagee were bound to act at his peril, and to take the franchise and property subject to unknown and unascertainable claims which might or might not come into existence at a later date.

There is no reason apparent in the present record why Newman should not enforce his claim against the Shoshone Light & Water Company if that Company is, upon any theory, liable for his damage. That Company has received payment of the purchase price of its property in full, and is, of course, bound to pay all its debts before making any distribution among the stockholders. There is no allegation or suggestion that the Shoshone Light & Water Company is now or was at any time insolvent, and nothing in the record to show whether Newman has or has not made any attempt to collect from that Company.

POINT V.

There is no evidence that the Water System was "held under" any franchise, which was leased or transferred by the Shoshone Light and Water Company or any franchise, in the operation, use, or enjoyment of which the liability to Newman was incurred.

The utter impossibility of applying section 15 of Article XI of the Constitution to the present controversy is demonstrated by an attempt to identify the franchise in the operation, use or enjoyment of which

the liability to Newman was incurred, and to ascertain whether that franchise was leased or transferred by the Shoshone Light and Water Company and whether the water system was "held under" that franchise. It has been held that the words "property held thereunder" do not include all property used for or in connection with the operation of the franchise, but only that property for the use of which the franchise is essential.

Cooper v. *Utah Light & Ry. Co.* 102 Pac. Repr. 202.

In this case the Company was engaged in the business of generating and distributing electricity and held a municipal franchise authorizing it to use the streets for its poles and wires. It was held that the power houses and other property belonging to the Company, which was not in the streets, was not "held under" the franchise, because the Company could have owned and operated such property without any franchise. The only property held under the franchise was that located in the streets for the construction and operation of which the franchise was essential. The Utah Supreme Court said at page 208:

> "However were it not for the direct recitals contained in the agreed statement of facts and upon which the findings of the court were based, we would be much inclined to the opinion that neither the stations, power houses, engines, boilers, nor other machinery used in generating or manufacturing electricity nor the real estate upon which they were situated, nor any of the personal property described in the findings

> would be properly held under the franchises granted by the municipality for the reason that it might well be said that all such property was held separate from and independent of the particular franchise referred to and had its existence wholly independent thereof. While it may be said that the stations and power houses and machinery were necessary to manufacture or generate the electricity which was conducted along the wires on the poles placed in the streets under the franchises, yet the granting of the franchises to use the streets for the purpose of erecting and maintaining poles and wires to conduct electricity was not necessary to the right or privilege to manufacture or generate electricity nor to produce or sell it as a commercial product. The corporation could have engaged in such business and could have acquired and held the plant, machinery and real estate and all the personal property mentioned in the findings and could even have conducted and delivered electricity to consumers wholly independent of the franchise granted it by Salt Lake City."

There is no evidence in the record to show what franchises were held by the Great Shoshone Power Company or the Shoshone Light and Water Company or whether any franchise was covered by the contract of July 1, 1912. Nor is there any allegation with respect to franchises in the petition of the Boise Title and Trust Company.

Even if it be inferred that the Great Shoshone Power Company had acquired a municipal franchise for the operation of the lighting system and water system in the town of Shoshone, there is no basis on

which anybody could determine whether it had one franchise to cover the two lines of business or a separate franchise for each. It is not impossible that the town should have granted one franchise broad enough to cover the use of the streets for the distribution of water as well as the distribution of electricity. It is much more likely, however, that separate franchises were granted at different times and to different grantees.

Even if there were only one franchise, nevertheless the liability to Newman was not incurred in the operation, use or enjoyment of that franchise, because the wires which caused the damage were on Newman's private property and not in the streets. The Company did not need any municipal franchise for the purpose of attaching those wires to his barn. In any event the "property held thereunder" would not include the entire water system. It would only include that part which was located in the streets.

If there were two separate franchises, it is clear that the water system could not, under any circumstances, be treated as "held under" the lighting franchise, and that the liability to Newman could not upon any theory be regarded as incurred in the operation, use or enjoyment of the water franchise. The result is that, upon this hypothesis, the water system could not have been "held under" any franchise in the operation, use or enjoyment of which the liability to Newman was incurred.

The record wholly fails to support the conclusion that the liability to Newman was incurred in the operation, use or enjoyment of any franchise leased or transferred by The Shoshone Light and Water Company,

or that the water system was "held under" any such franchise. The inevitable result is that Newman could not have any right under Section 15 to follow the water system for the satisfaction of his claim.

The District Court clearly recognized that it was impossible to ascertain what amount was realized from the sale of the lighting system. Much less could anybody determine what amount was realized from the sale of that part of the lighting system or water system which was located in the streets. The Court directed the payment of the claim out of the proceeds of the sale of the water system because that was the only part of the property acquired from the Shoshone Light & Water Company which was sold separately. It is clear, however, that such a result cannot possibly be justified even on the legal theory adopted by the Court.

POINT VI.

The order appealed from should be reversed and the petition of the Boise Title & Trust Company should be dismissed.

Respectfully submitted,

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